Supreme Court, U.S.
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No. 98-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

TRANSAERO, INC.,

Petitioner,

v.

LA FUERZA AEREA BOLIVIANA,
an Agency or Instrumentality of the
Republic of Bolivia, a Foreign State,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, once an appellate court has reviewed and affirmed that a district court's evidentiary and legal determinations made when entering a default judgment against a foreign sovereign have satisfied the provisions of the Foreign Sovereign Immunities Act, *28 U.S.C. § 1608(e),* the personal and subject matter jurisdiction determinations contained in the default judgment are entitled to a res judicata or collateral estoppel effect in subsequent proceedings in that case in the same circuit and other federal circuit courts where the judgment has been registered pursuant to 28 U.S.C. § 1963.

2. Whether a foreign government defendant who cites "lack of notice" as the reason for its lateness in bringing, litigating, and appealing the denial of a Rule 60(b)(4) and 60(b)(6) motion challenging the validity of a four year-old default judgment for lack of subject matter jurisdiction has, pursuant to Federal Rules of Civil Procedure 12(g) and (h) and this Court's decisions in such cases as *Insurance Corp. v. Compagnie Des Bauxites,* 456 U.S. 694 (1982) and *American Surety Co. v. Baldwin*, 287 U.S. 156 (1931), waived its challenge to the validity of the default judgment for allegedly improper service of process and personal jurisdiction.

3. Whether a panel of the United States Court of Appeals for the Second Circuit had decided the question of the res judicata or collateral estoppel effect of a split decision by the United States Court of Appeals for the District of Columbia Circuit in independent collateral enforcement proceedings pursuant to 28 U.S.C. § 1963 holding that a default judgment entered by the United

States District Court for the Eastern District of New York was void for allegedly invalid service of process, when:

(A) Prior to the issuance of the D.C. Circuit's decision, the Second Circuit panel had affirmed an independent ruling of the Eastern District of New York and had left the judgment intact, holding that the judgment should not be set aside for lack of subject matter jurisdiction and noting the lower court's prior holdings that service of process and personal jurisdiction had existed at the time judgment was entered; and

(B) Subsequent to the issuance of the D.C. Circuit's split decision, the Second Circuit asked the parties whether it should vacate its earlier decision and declare the default judgment void based on the D.C. Circuit's decision, and, upon briefing and review, held that the decision affected "no open questions"; left its earlier decision and the judgment intact; and remanded the case back to the lower court for limited proceedings to verify the mathematical accuracy of the judgment.

4. Whether the decision of an appellate court in independent collateral proceedings declaring that a default judgment registered pursuant to 28 U.S.C. §1963 was void for alleged insufficiency of service of process is entitled to a res judicata or collateral estoppel effect in subsequent proceedings in other federal circuit courts where, when declaring the judgment void, the appellate court refused to consider the res judicata

effect of an earlier decision by the federal appellate court for the district court that had originally entered the default judgment refusing to set aside the judgment on jurisdictional grounds.

PARTIES BELOW

The parties in the proceeding below were the following:

Transaero, Inc., a privately-held company which is headquartered in New York State. It has no parent companies, subsidiaries, or affiliates which have any outstanding securities in the hands of the public. Its primary line of business is in the aviation equipment and services industry.

La Fuerza Aerea Boliviana, the Air Force of the Republic of Bolivia.

GLOSSARY

Throughout this Petition, the term "FSIA" refers to the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602 -1611.

"BAF" refers to the "Bolivian Air Force."

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II. In its efforts to "go to great lengths to set aside" a valid default judgment entered against a foreign government, the decision of the panel in *Transaero V* has so far departed from the accepted and usual course of judicial proceedings as established by the decisions of this Court and the Federal Rules of Civil Procedure as to call for the exercise of this Court's supervisory power. 24

III. The Second Circuit panel decision in *Transaero V* has created a split with the D.C. Circuit on whether a foreign government may effectively preserve a challenge to personal jurisdiction under Federal Rule of Civil Procedure 12(g)

and (h) by mere reference to the issue in its pleadings without also fully litigating the challenge in its first defensive move. 29

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A Opinion of the United States Court of Appeals for the Second Circuit, *Transaero, Inc., v. La Fuerza Aerea Boliviana,* 162 F.3d 724 (2nd Cir. Dec. 11, 1998)("*Transaero V*")

B Order of the United States Court of Appeals for the Second Circuit denying petition for rehearing and suggestion for rehearing, en banc, *Transaero, Inc. v. La Fuerza Aerea Boliviana* (2nd Cir. Jan. 21, 1999)

C Mandate, United States Court of Appeals for the Second Circuit, *Transaero, Inc., v. La Fuerza Aerea Boliviana*, (Nos. 97-9317, -9327, Jan. 25, 1999)

D Memorandum Opinion of Decision and Order, United States District Court, Eastern District of New York, CV 88-2788 (August 4, 1995)(Mishler, J.)

E Memorandum Decision and Order, United States District Court for the Eastern District of New York, CV 88-2788 (August 22, 1995)(Mishler, J.)

F Memorandum Opinion of Decision and Order, United States District Court, Eastern District of New York, CV 88-2788 (Jan. 16, 1997)(Mishler, J.)

G Memorandum Opinion of Decision and Order, United States District Court, Eastern District of New York, CV 88-2788 (April 21, 1989)(Mishler, J.)

H Default Judgment, United States District Court, Eastern District of New York, CV 88-2788 (April 28, 1989)

I Order, United States District Court for the District of Columbia, Misc. Action No. 91-0139 (Sept. 25, 1992)(Revercomb, J.)

J Memorandum of Decision and Order, United States District Court, Eastern District of New York, 88-CV-2788 (August 12, 1993)(Mishler, J.)

K Opinion of the United States Court of Appeals for the Second Circuit, Transaero, Inc., v. La Fuerza Aerea Boliviana, 24 F.3d 457 (2nd Cir. May 19, 1994)("*Transaero I*")

L May 23, 1994 correspondence to the United States Court of Appeals for the District of Columbia Circuit.

M Opinion of the United States Court of Appeals for the District of Columbia Circuit, *Transaero, Inc., v. La Fuerza Aerea Boliviana,* 30 F.3d 148, 308 U.S.App. D.C. 86 (D.C. Cir. Jul. 29, 1994)("*Transaero II*").

N Order denying petition for rehearing, United States Court of Appeals for the District of Columbia Circuit, *Transaero, Inc. v. La Fuerza Aerea Boliviana*, (No. 94-7222, Sept. 15, 1994)

O Order denying petition suggesting rehearing en banc, United States Court of Appeals for the District of Columbia Circuit, *Transaero, Inc., v. La Fuerza Aerea Boliviana,* (No. 94-7222, Sept. 15, 1994)

P Order, Supreme Court of the United States, denying petition for a writ of certiorari to the District of Columbia Circuit, *Transaero, Inc. v. La Fuerza Aerea Boliviana,* 513 U.S. 1150, 115 S.Ct. 1101 (No. 94-1054, Feb. 21, 1995)

Q August 23, 1994 letter to counsel, United States Court of Appeals for the Second Circuit, *Transaero, Inc. v. La Fuerza Aerea Boliviana,* (No. 93-7903)

R Supplemental Opinion on Rehearing of the United States Court of Appeals for the Second Circuit, *Transaero, Inc., v. La Fuerza Aerea Boliviana*, 38 F.3d 648 (2nd Cir., Oct. 19, 1994)("*Transaero III*")

S. Mandate, United States Court of Appeals for the Second Circuit, *Transaero, Inc. v. La Fuerza Aerea Boliviana* (No. 93-7903, March 27, 1995)

T. Opinion, United States Court of Appeals for the Second Circuit, *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 99 F.3d 538 (2nd Cir., Nov. 6, 1996)("*Transaero IV*")

U. Order, Supreme Court of the United States, denying petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit, *La Fuerza Aerea Boliviana v. Transaero, Inc.*, 520 U.S. 1240, 117 S.Ct. 1843 (No. 96-1507, May 27, 1997)

V. Memorandum Decision and Order, United States District Court for the Eastern District of New York, CV 88-2788 (September 18, 1997)(Mishler, J.)

W. Amended Judgment, United States District Court for the Eastern District of New York, CV 88-2788 (September 18, 1997)(Mishler, J.)

X Memorandum Decision and Order, United States District Court for the Eastern District of New York, CV 88-2788 (Oct. 17, 1997)(Mishler, J.)

Y Statutory Material: Excerpts from the Foreign Sovereign Immunities Act

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Transaero, Inc., Petitioner herein, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit is reported at *Transaero, Inc., v. La Fuerza Aerea Boliviana*, 162 F.3d 724 (2nd Cir., Dec. 11, 1998), and is set forth hereto in its entirety in Appendix A. The January 21, 1999 Order denying the petition for rehearing and suggestion for rehearing en banc is set forth in Appendix B. The January 25, 1998 mandate of the Second Circuit is set forth at Appendix C.

The Second Circuit's decision reverses two separate opinions by the Hon. Jacob A. Mishler of the United States District Court for the Eastern District of New York, dated August 4, 1995 and January 16, 1997, which affirm a 1989 default judgment and opinion entered by that court in favor of Petitioner Transaero, Inc. These decisions have not been reported. They are set forth in their entirety hereto in Appendixes D and F.

A copy of the original April 21, 1989 decision entering judgment in this case is set forth in its entirety in Appendix G. A copy of the April 28, 1989 judgment is set forth in Appendix H. A copy of the September 25, 1992 independent collateral decision of the United States District Court for the District of Columbia denying the Air Force's motion to set aside the judgment for allegedly improper service of process is set forth in Appendix I. A Memorandum Opinion and Order dated August 12, 1993, of the United States District Court for the Eastern District of New York refusing to set aside the validity of the 1989 default judgment has not been reported and is set forth in its entirety in Appendix J. The opinion of the United States Court of Appeals for the Second Circuit affirming the

Eastern District's opinion is reported at *Transaero, Inc., v. La Fuerza Aerea Boliviana*, 24 F.3d 457 (2d Cir., May 19, 1994)("*Transaero I*"), and is set forth hereto in its entirety in Appendix K. After the Second Circuit issued its decision, the D.C. Circuit issued a split decision holding that the judgment was void. *Transaero, Inc., v. La Fuerza Aerea Boliviana*, 30 F.3d 148 (D.C. Cir. July 29, 1994)("*Transaero II*"). A copy is attached as Appendix M. A copy of this Court's Order denying a petition for certiorari of that decision is reported at *Transaero, Inc. v. La Fuerza Aerea Boliviana*, 513 U.S. 1150, 115 S.Ct. 1101 (Feb. 21, 1995), and is set forth in Appendix P.

Upon entry of the D.C. Circuit's decision, the Second Circuit asked the parties to brief the question of whether the decision in *Transaero I* should be set aside in light of the D.C. Circuit's decision in *Transaero II*. The Second Circuit's decision holding that it would not set aside the 1989 judgment or its decision in *Transaero I* based on the decision in *Transaero II* is reported at *Transaero, Inc., v. La Fuerza Aerea Boliviana*, 38 F.3d 648 (2nd Cir., Oct. 19, 1994)("*Transaero III*") and is set forth in Appendix R. The Second Circuit mandate for the decisions in *Transaero I* and *III* is set forth at Appendix S.

The decision by the United States Court of Appeals for the Second Circuit dismissing an interlocutory appeal by the Air Force of the lower court's 1995 decision on remand is reported at *Transaero, Inc., v. La Fuerza Aerea Boliviana*, 99 F.3d 538 (2nd Cir., Nov. 6, 1998)("*Transaero IV*") and is set forth in Appendix T. This Court's denial of the Air Force's petition for a writ of certiorari of that decision is reported at *La Fuerza Aerea Boliviana v. Transaero*, 520 U.S. 1240, 117 S.Ct. 1843 (May 27, 1997), and is set forth in Appendix U. The final decisions and orders of the Eastern District are set forth in Appendixes V- X.

GROUNDS FOR JURISDICTION

The Second Circuit issued its decision on December 11, 1998. Petitioner timely filed a petition for rehearing and suggestion for rehearing *en banc*. The order denying the petition for rehearing was issued on January 21, 1999 and is set forth in Appendix B. In accordance with Rule 13.4 of this Court, this petition for a writ of certiorari was timely filed within ninety days of the date rehearing was denied. The jurisdiction of this Court is invoked under *28 U.S.C. § 1254(1)*; *28 U.S.C. § 1602 et seq.*; and *28 U.S.C. §§ 1330* and *1331*.

Grounds for jurisdiction over this case by the United States Court of Appeals for the Second Circuit was properly invoked pursuant to 28 U.S.C. §1291.

STATUTES INVOLVED

The statutes involved are Federal Rules of Civil Procedure 12(g), 12(h) and 60(b)(1)-(6). They are reproduced in Appendix Z. This case also involves the Foreign Sovereign Immunities Act, *28 U.S.C. §§ 1330, 1391, 1602 - 1611*, specifically those portions dealing with the definitions of "foreign state" and "agency or instrumentality of a foreign state" set forth at *28 U.S.C. § 1603;* service of process on such entities, set forth at *28 U.S.C. § 1608;* and entry of default judgments, *28 U.S.C. §1608(e)*. The portions of the statute relevant to this petition are reproduced in Appendix Y.

STATEMENT OF THE CASE

This case involves the jurisdictional validity of a 1989 default judgment entered by the United States District Court for the Eastern District of New York against the Bolivian Air Force pursuant to provisions of the Foreign Sovereign Immunities Act, *28 U.S.C. § 1602, et seq.* ("*FSIA*"). It has been the subject of five different appellate court decisions by two different federal circuit courts of appeal, plus two prior

1994 and 1997 petitions for writs of certiorari to this Court, one brought by each party. A detailed history of the proceedings below is necessary, given the procedural history of the case, the multiple rulings by different courts on the same questions of law, and the issues of res judicata and collateral estoppel presented by the case.

In 1981, Transaero, Inc., a New York corporation, entered into an agreement with the Bolivian Air Force ("Air Force" or "BAF") to sell it aircraft parts, pursuant to a sales finance agreement. After many years of partial payments and attempts to get the BAF to adhere to its agreement, in 1988 Transaero brought suit in the United States District Court for the Eastern District of New York ("EDNY") for breach of contract and on an account stated. Jurisdiction over the Air Force was asserted pursuant to the provisions of the Foreign Immunities Act ("FSIA"). The Air Force was served pursuant to the provisions of the FSIA governing service of process on agencies or instrumentalities of foreign states, 28 U.S.C. § 1608(b), a status that the Air Force had previously asserted it had in other litigation it had initiated in the federal district courts. [1] The BAF chose not to answer the suit or enter an appearance, even though every court examining the issue has agreed that the Air Force was correctly served pursuant to the provisions of the Foreign Sovereign Immunities Act governing service of process on agencies or instrumentalities of foreign states, and that the BAF had actual notice of the lawsuit.[2]

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[1] *See., e.g., Office of the Comptroller General of the Republic of Bolivia on behalf of the Bolivian Air Force and Central Bank of Bolivia v. International Promotions and Ventures, Ltd.*, 618 F.Supp. 202 (1985).

[2] *See, e.g., Transaero, Inc., v. La Fuerza Aerea Boliviana*, 30 F.3d 148 (D.C. Cir. 1994)("*Transaero II*")(App. M).

After an inquest and hearing on damages, by Memorandum Decision and Order dated April 21, 1989, the Honorable Jacob A. Mishler of the EDNY granted Transaero's motion for a default judgment, finding that: (1) The summons and complaint were properly served on the Air Force in accordance with 28 U.S.C. § 1608(b)(3)(B); (2) the Air Force had adequate notice of the hearing scheduled for March 30, 1989, but failed to enter an appearance; (3) The complaint stated a cause of action based on breach of contract for the Air Force's failure to pay amounts due and owing for the purchase and delivery of aviation equipment; (4) The Air Force was not entitled to sovereign immunity under the Foreign Sovereign Immunities Act because its purchases of the aviation equipment constituted "commercial activities" within the "commercial activities" exception of 28 U.S.C. § 1605(a)(2) of the FSIA; and (5) Transaero's claim was supported by the proof submitted and it was thus entitled to judgment. (App. G).

A default judgment was entered against the Air Force in the amount of $983,696.60 on April 28, 1989. (App. H.) No appeal was taken. Subsequently, Transaero attempted to get the BAF to voluntarily pay the judgment. After the Bolivian Government failed to follow through on its promises to set up a Commission to pay the judgment, Transaero registered the judgment for enforcement purposes in the United States District Court for the District of Columbia, pursuant to 28 U.S.C. §1963.

The Air Force first sought to challenge the judgment in 1992 in an independent collateral proceeding in the United States District Court for the District of Columbia. In response to Transaero's attempt to obtain discovery of its assets, the BAF brought a motion for summary judgment seeking to set aside the judgment as being void for allegedly defective service of process, on the grounds that the Air Force should have been

served pursuant to the provisions of the FSIA governing service of process against foreign states, 28 U.S.C. § 1608(a), rather than those governing agencies or instrumentalities, 28 U.S.C. §1608(b).

In September, 1992, the late Hon. George Revercomb of the United States District Court for the District of Columbia denied the BAF's motion and found that it had been validly served as an agency or instrumentality of a foreign state pursuant to the provisions of Section 1608(b) of the FSIA. (App.I) The BAF appealed this decision to the D.C. Circuit.

While this appeal was pending, the BAF changed counsel. In 1993, the Air Force voluntarily entered its first appearance in the EDNY, the court rendering the original 1989 judgment. It filed a motion under Rules 60(b)(4) and 60(b)(6) asking that the 1989 judgment be declared void and vacated. With respect to Rule 60(b)(4), the BAF alleged that the 1989 judgment was void due to lack of subject matter jurisdiction. With respect to Rule 60(b)(6), it argued that the 1989 judgment should be declared void because the original counsel for Transaero allegedly had committed a "fraud on the court" by allegedly failing to disclose to the court that the 1989 judgment was based on compound interest; that such interest was allegedly unlawful under New York law; and that the parties had allegedly settled their dispute in 1986, when the Air Force had made a partial payment to Transaero of the sums it was claiming.

Although the Air Force specifically brought a Rule 60(b)(4) motion challenging the subject matter jurisdiction of the 1989 judgment, with respect to the pending collateral proceedings in the D.C. Circuit, it merely included the following footnote in its opening brief:

> The Air Force has appealed Judge Revercomb's opinion. See Exh. 19 (notice of appeal). The Air Force

> acknowledges that until overturned on its pending appeal, Judge Revercomb's opinion bars the Air Force from challenging the propriety of service under the Foreign Sovereign Immunities Act. *See Huron Corp. V. Lincoln Co.*, 312 U.S. 183, 188-189 (1941)(judgment on appeal still final judgment); *Petrella v. Siegel*, 843 F.2d 87, 90 (2nd Cir. 1988)(judgment pending appeal entitled to res judicata effect); *United States v. NYSCO Laboratories, Inc.*, 318 F.2d 817 (2d Circuit 1963)(same). Although barred by res judicata from contesting it, the Air Force in no way waives these issues. In this, its first responsive pleading, the Air Force preserves its challenges to Transaero's improper service of process and this Court's lack of personal and subject-matter jurisdiction under the Foreign Sovereign Immunities Act and the United States Constitution.

The Air Force did not specifically ask Judge Mishler of the EDNY to adopt or otherwise incorporate the independent collateral 1992 ruling of the United States District Court for the District of Columbia as being his own, or to revisit his own separate and independent 1989 determination that service of process and jurisdiction over the BAF had been proper.

In August, 1993, Judge Mishler denied the BAF's motion, holding that "*we properly exercised subject matter jurisdiction in this case*" when judgment was entered in 1989. (App. J, at 84a)(emphasis added). With respect to the Air Force's other arguments, Judge Mishler ruled that BAF's claims were:

> "nothing more than an alternative interpretation of the documentary evidence from that offered by [prior counsel for Transaero] and ultimately accepted by this Court. *The arguments it offers are simply those it could*

have brought forward at the 1989 hearing, but chose not to do."

(App. J at 84a)(emphasis added).

In denying the BAF's motion on the grounds that its arguments were nothing more than those it could have brought at the time the default judgment was entered, the EDNY never referenced, incorporated, or discussed the 1992 district court ruling or appeal then pending in the D.C. Circuit. However, the EDNY specifically noted its own independent ruling in April, 1989 holding that service of process had been proper over the Air Force. (App. J at 78a).

The Air Force subsequently appealed the EDNY's 1993 decision to the Second Circuit. It's simultaneous collateral appeals of the two independent 1992 and 1993 lower court decisions were argued before the Second Circuit and the D.C. Circuit during the same week of February, 1994.

The Second Circuit was the first to rule. In a decision dated May 19, 1994, the Second Circuit affirmed the EDNY's 1993 refusal to set aside the 1989 default judgment, holding that: (1) the lower court did have proper subject matter jurisdiction over the cause of action in 1989 and that the judgement was not void under Rule 60(b)(4); (2) the EDNY had adhered to the requirements of Section 1608(e) of the Foreign Sovereign Immunities Act when entering judgment against the Air Force in 1989; and (3) there was no merit to the Air Force's allegations that the 1989 judgment had been procured by a "fraud on the court" and that Transaero had a legal and factual basis upon which the 1989 judgment of compound interest was based. *Transaero, Inc., v. La Fuerza Aerea Boliviana,* 24 F.3d 457 (2nd Cir., May 19, 1994)("*Transaero I*")(App. K). While recognizing that "[c]ourts go to great lengths ... to permit [default] judgments against foreign sovereigns to be set aside," the Second Circuit refused to set aside the judgment on

equitable grounds, although it did remand the case back to the lower court for the limited purpose of re-examining the mathematical accuracy of the award to Transaero. 24. F3d at 462. (App. K at 100a)

With respect to the concurrent collateral proceedings in the D.C. Circuit and the reason why the Air Force had originally defaulted, in a footnote the Second Circuit held:

> 1. It is BAF's position that it defaulted because it lacked proper notice of Transaero's complaint and of the hearing. *Judge Mishler found to the contrary in his Opinion of April 21, 1989 directing entry of the default judgment* and so did the late Judge Revercomb in *a separate proceeding* in the District Court for the District of Columbia. BAF's appeal of Judge Revercomb's Order of September 25, 1992 is now pending in the Circuit Court for the District of Columbia.

24 F.3d 459, n.1 (App. K at 92a)(emphasis added).

In response to the Second Circuit's decision refusing to set aside the 1989 judgment, by letter dated May 23, 1994, counsel for Transaero advised the D.C. Circuit of the Second Circuit's May 19, 1994 ruling and submitted that it was Transaero's position that the Second Circuit's ruling was dispositive of the appeal which was still pending before the D.C. Circuit. (App. L.) Transaero offered to brief this issue to the D.C. Circuit.

The D.C. Circuit did not respond to counsel's letter or otherwise ask for a briefing on the res judicata effects of the Second Circuit's decision in *Transaero I*. Instead, two months later, in a July 29, 1994 split decision, the D.C. Circuit reversed the 1992 decision of Judge Revercomb and held that the 1989 default judgment was void for improper service of process.

Transaero, Inc., v. La Fuerza Aerea Boliviana, 30 F.3d 148 (D.C.Cir., Jul. 29, 1994)("*Transaero II*")(App.M).

Ignoring the fact that the Air Force had previously represented in other federal court proceedings that it was an agency or instrumentality of the Republic of Bolivia, the majority of the D.C. Circuit rejected the criteria set forth in the Committee Report to the FSIA for determining agency status finding that it was "at odds with itself." 30 F.3d at 152. (App. M at 115a). Adopting a new legal standard for determining the status of an "agency or instrumentality" under the FSIA, the majority of the D.C. Circuit held that the Air Force should have been served pursuant to the provisions of the FSIA governing service on foreign states. (App. M at 111a-120a).

The former Chief Judge of the D.C. Circuit dissented from the majority's decision, stating that:

> "I fear that in formulating their interpretation my colleagues have placed efficiency concerns - and perhaps their international policy preferences - above the apparent meaning of the statue. Because this case requires us to interpret Congress's enactment, and not to devise common law rules, I think the majority's approach is insufficiently deferential to the legislature."

30 F.3d at 154(dissent). (App. M., dissent at 120a-121a.) The dissent further stated that "the language, policy, and legislative history of the FSIA" did not support the majority's approach. Instead, the lower court had used the proper test in applying the criteria set forth in the Committee Report. (App. M, dissent, at 125a).

In rendering its decision, the D.C. Circuit did acknowledge that the Second Circuit's earlier decision had affirmed Judge Mishler's 1993 ruling and had refused to set aside the 1989 judgment. It also noted that both district courts had held that

the Air Force had been properly served. However, it refused to consider the *res judicata* effect of the prior May 19, 1994 decision of the Second Circuit refusing to set aside the 1989 judgment on the grounds that Transaero had allegedly not raised this issue in the proceedings before Judge Revercomb, stating:

> The Second Circuit noted that the district courts in New York and the District of Columbia had held that the Air Force was properly served, but also noted the pending appeal that we decide today. See id. at n. 1. We do not consider whether the Eastern District's ruling might bar the Air Force's attack on personal jurisdiction, for Transaero did not assert any form of preclusion in the District Court for the District of Columbia, and we have generally refused to raise the question sua sponte.

30 F.3d at 150. (App. M, at 110a, n. 1.)(citations omitted). In its Petition for Rehearing and suggestion for rehearing *en banc* to the D.C. Circuit, Transaero noted to the D.C. Circuit that while it had argued to Judge Revercomb that he should have referred the case back to Judge Mishler, it could not have argued the preclusive effects of the subsequent 1993 and 1994 Second Circuit proceedings in a proceeding which had been held before Judge Revercomb in 1992. Transaero further argued that it had raised this issue in briefing the appeal before the D.C. Circuit, and that it could raise it in a petition for rehearing. The D.C. Circuit denied Transaero's Petition for Rehearing and thus did not address these arguments. (App. N.)

The dissent agreed with the majority that Judge Mishler's 1989 ruling that service was proper did not preclude the D.C. Circuit from finding to the contrary, but he noted that such a finding, in light of the subsequent acknowledgment by the Second Circuit of Judge Mishler's 1989 and 1993 findings on

appeal, would clash with the prevailing Second Circuit law on the facts of the case and would create "the functional equivalent of a split between [the D.C.] Circuit and the Second." 30 F.3d at 154. (App. M, dissent at 121a.)

Prior to the issuance of the D.C. Circuit's decision, the Air Force had filed a Petition for Rehearing in the Second Circuit proceeding. Upon being informed of the D.C. Circuit's July 29, 1994 decision, the Second Circuit sent the following letter dated August 23, 1994, to counsel for Transaero:

> The panel that heard the above-captioned case requests a response within twenty (20) days to the petition for rehearing, *specifically discussing why this Court should not grant the petition, withdraw its opinion, and remand with directions to dismiss the case in light of the decision of the District of Columbia Court of Appeals concluding that the Eastern District of New York lacked jurisdiction.*

(App. Q)(emphasis added).

After a full briefing of this question by both parties, in which Transaero argued to the Second Circuit that its first decision in *Transaero I* had made the question of jurisdiction res judicata and that the D.C. Circuit's decision was thus not binding on the Second Circuit, the Second Circuit issued a supplemental decision on October 19, 1994. *Transaero, Inc., v. La Fuerza Aerea Boliviana,* 38 F.3d 648 (2nd Cir., Oct. 19, 1994)("*Transaero III*")(App. R). Noting that the Air Force had claimed lack of notice as grounds for setting aside the 1989 judgment in its initial appellate briefs, and had briefed the issue of defective service in its reply brief in *Transaero I*, the Second Circuit refused to set aside its earlier, May, 1994 decision in *Transaero I*, or to void the 1989 judgment based on the D.C. Circuit's decision. Instead, it held that:

> *we conclude that whatever preclusive effect that decision might have on issues that are open for decision in any court,* it is not a circumstance requiring us to grant BAF's petition for rehearing. That petition afforded BAF an opportunity to indicate "the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended." Fed. R. App. P. 40(a). BAF's petition for rehearing did not contend that we had overlooked or misapprehended any aspect of its contention regarding defective service. Indeed, it is by no means clear that BAF's initial appeal had urged us to reverse the denial of the Rule 60(b) motion for lack of defective service. *In short, we have now pending no open issue on which the preclusive effect of the D.C. Circuit's decision, if any, may operate.* Therefore, without expressing any views as to (a) the validity of Transaero's service of process upon BAF in initiating the Eastern District suit or (b) whether the default judgment is impaired by the allegedly late notice of its entry, we decline to grant the petition for rehearing just because the D.C. Circuit has ruled that the default judgment is not enforceable in the District of Columbia. We need not decide whether BAF is entitled to pursue a new Rule 60(b) motion in the Eastern District, now that the D.C. Circuit has declared the default judgment to be void.

38 F.3d 648 at 650. (App. R, at 142a-143a)(emphasis added).

Instead, the Second Circuit slightly broadened the earlier remand to include a third issue that the lower court was to examine with respect to the mathematical accuracy of the 1989 judgment. It then stayed issuance of its mandate remanding the case back to the lower court pending disposition of Transaero's petition for a writ of certiorari to this Court for review of the

D.C. Circuit's decision. This Court subsequently denied Transaero's petition. *Transaero, Inc. v. La Fuerza Aerea Boliviana,* 513 U.S. 1150 (Feb. 21, 1995)(App. P at 132a). The Air Force did not seek this Court's review of the Second Circuit's two decisions in *Transaero I* or *III*.

In March, 1995, the case was remanded back to the EDNY by the Second Circuit for the limited proceedings authorized by the decisions in *Transaero I* and *III*. (App. S at 146a.) The Air Force filed a new Rule 60(b)(4) motion seeking to set aside the 1989 judgment as being void for improper service of process based on the D.C. Circuit's decision in *Transaero II*. Transaero filed its own motion addressing the three issues remanded by the Second Circuit in *Transaero I* and *III*, and asked the lower court judge to reaffirm the validity of the mathematical accuracy of the 1989 judgment.

In a decision dated August 4, 1995, the EDNY denied the Air Force's motion to set aside the 1989 judgment based on the D.C. Circuit's decision. (App. D.) It held that the question of the jurisdictional validity of the 1989 judgment had been decided by the Second Circuit's initial decision in *Transaero I* affirming the EDNY's August 1993 ruling denying the Air Force's earlier Rule 60(b)(4) and (6) motions to set aside the judgment. Noting that the Second Circuit had refused to set aside the 1989 judgment on the jurisdictional grounds raised by the Air Force in its first motion, the EDNY held that based on this Court's decisions in *Chicot County Drainage Dist. v. Baxter State Bank,* 308 U.S. 371, 60 S.Ct. 317 (1940); *Durfee v. Duke*, 375 U.S. 106, 84 S.Ct. 242 (1963); and *Baldwin v. Traveling Men's Assn.*, 283 U.S. 522, 51 S.Ct. 517 (1931), the Second Circuit had implicitly and explicitly decided the jurisdictional questions. To the extent that the Air Force had not directly asked for the EDNY or the Second Circuit to rule on the validity of service of process, Judge Mishler found that

the Air Force had waived these challenges based on this Court's decisions in *Insurance Corp. v. Compagnie Des Bauxites,* 456 U.S. 694, 1102 S.Ct. 2099 (1982); *American Surety Co. v. Baldwin*, 287 U.S. 156, 53 S.Ct. 98; *Stoll v. Gottlieb,* 305 U.S. 165, 59 S.Ct. 134 (1938); and the explicit provisions of Federal Rule of Civil Procedure 12(h), which provide that challenges to personal jurisdiction will be waived if not consolidated and brought in the first substantive procedural motion.

Judge Mishler further held that in *Transaero II*, the D.C. Circuit had failed to give the appropriate res judicata effect to the Second Circuit's initial decision in *Transaero I*, and that Transaero had properly raised the question in that proceeding. Citing this Court's decisions in *Stoll v. Gottlieb*, 305 U.S. 165, 59 S.Ct. 134 (1938); *Chicago Life Ins. Co. v. Cherry*, 244 U.S. 25, 37 S.Ct. 492 (1917); and *Treines v. Sunshine Mining Co.*, 308 U.S. 66, 60 S.Ct. 44 (1939), the EDNY held that the D.C. Circuit's decision should not be given a *res judicata* effect by any non-D.C. Circuit court because the Second Circuit's decision in *Transaero III* was the last, and thus dispositive, ruling on jurisdiction. (App. D at 42a-44a.)

Upon denial of its motion for reconsideration, the Air Force filed an interlocutory appeal of the lower court's decision. The lower court issued a stay of that decision pending disposition of the Air Force's appeal. In *Transaero IV*, the Second Circuit dismissed the Air Force's appeal without prejudice, ruling that pursuant to this Court's decision in *Van Cauwenberghe v. Biard,* 486 U.S. 517 (1988), it lacked jurisdiction to hear the Air Force's interlocutory appeal because the lower court's order merely pertained to an alleged improper ruling concerning service of process which could be effectively vindicated following completion and final judgment in the lower court proceedings on remand. *Transaero, Inc. v. La*

Fuerza Aerea Boliviana, 99 F.3d 538 (2nd Cir. Nov. 6, 1996)("*Transaero IV*")(App. T). The Air Force filed a petition for certiorari of that decision to this Court, which was denied. *La Fuerza Aerea Boliviana v. Transaero, Inc.*, 520 U.S. 1240, 117 S.Ct. 1843 (No. 96-1507, May 27, 1997) (App. U).

Upon return of the case for completion of the proceedings ordered by the panel in *Transaero I* and *III*, the EDNY *sua sponte* issued an additional ruling with respect to the effect on jurisdiction of the D.C. Circuit's decision in *Transaero II.* (App. F). In an order dated January 16, 1997, Judge Mishler held that in addition to his earlier rulings on the issue, the Second Circuit's earlier decisions in *Transaero I* and *III* failing to set aside the 1989 judgment for lack of subject matter jurisdiction grounds or as a result of the D.C. Circuit's decision in *Transaero II* was the established and governing law of the case that the 1989 judgment was jurisdictionally valid. Pursuant to the mandate rule, the EDNY held that it could not revisit the question or set aside the 1989 judgment as a result of the D.C. Circuit's decision in *Transaero II. Id.*

In the subsequent proceedings on remand, the EDNY refused to consider the BAF's additional attempts to argue that the 1989 judgment was void as a result of the D.C. Circuit's decision in *Transaero II.*[3] After two days of hearings in which it received evidence and testimony, the EDNY reopened the 1989 default judgement. (App. V.) In a decision dated September 18, 1997, the EDNY vacated the default judgment of $983,696.00 that had been entered in Transaero's favor on

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[3] Judge Mishler also denied Transaero's motion to limit the scope of the proceedings on remand to the three discrete issues concerning the mathematical accuracy of the judgment as identified by the Second Circuit's mandate. At the request of the Air Force, discovery in the proceedings on remand was limited so as to preclude Transaero's right of discovery from the Air Force of its books and records. (App. E).

April 28, 1989 and, some nine years later, substituted it with an award of $336,232.00. (App. W)[4]

Upon vacation of the 1989 judgment and entry of the revised judgment in the EDNY, the parties filed cross-appeals to the Second Circuit. The Air Force appealed the EDNY's prior August, 1995 and January, 1997 decisions denying its Rule 60(b)(4) motion to void the judgment as a result of the D.C. Circuit's decision in *Transaero II.* In the alternative, the Air Force sought review of the EDNY's refusal to consider the question of whether its 1986 partial payment had in fact been a settlement of the parties' dispute. Transaero's cross-appeal sought reversal of the EDNY's vacation of the 1989 judgment as being beyond the scope of the Second Circuit's mandate and contrary to the law and evidence.

After briefing and oral argument, a different panel of the Second Circuit from the original panel in *Transaero I* and *III* issued its December 11, 1998 decision in *Transaero V*, reversing the lower court's decisions of August 4, 1995 and January 16, 1997, and holding that the EDNY had improperly refused to give a res judicata effect to the D.C. Circuit's decision in *Transaero II. Transaero, Inc. v. La Fuerza Aerea Boliviana,* 162 F.3d 724 (2nd Cir., Dec. 11, 1998)("*Transaero V*")(App. A).

Notwithstanding the actual language contained in the earlier panel decisions in *Transaero I* and *III*, and the fact that the original panel in *Transaero I* had specifically asked the parties to brief the effect of the D.C. Circuit's decision and had then declined to set aside its earlier decision or the 1989 judgment based on that ruling, the panel in *Transaero V* held that the

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[4] The decision was subsequently slightly modified in response to Transaero's motion for reconsideration, but the revised judgment was left undisturbed. (App. X)

earlier Second Circuit panel had never ruled on the question of service of process or personal jurisdiction, either implicitly or explicitly. (App. A at 15a.) The panel in *Transaero V* thus held that Judge Mishler had abused his discretion in holding to the contrary. It never discussed the fact that in his 1993 ruling Judge Mishler had explicitly reaffirmed that the Air Force had been properly served and had notice of the 1989 proceedings, and that the earlier panel in *Transaero I and III* had left this finding undisturbed when leaving the judgment intact.

With respect to the district court's holding that pursuant to Federal Rule of Civil Procedure 12(h) and this Court's decision in such cases as *Insurance Corp. of Ireland v. Compagnie Des Bauxites De Guinea*, 456 U.S. 694 (1982) the Air Force had implicitly and explicitly waived its right to rely upon the D.C. Circuit's decision by entering a separate appearance in the EDNY and not arguing the issue while its other appeal was pending, the panel in *Transaero V* held that the Air Force had effectively preserved its challenge and satisfied the requirements of Rule 12(h) by noting the pendency of the separate appeal in a footnote. (App. A at 13a-14a). The panel failed to discuss and made no reference to the requirement in F.R.C.P. Rule 12(g) that all substantive defenses involving challenges to service of process or personal jurisdiction must be consolidated within the same motion.

With respect to the original panel's decision in *Transaero I* holding that the EDNY had independently ruled on the service of process question when entering his original judgment in 1989, the panel in *Transaero V* held that this was not a ruling on the validity of service of process. (App. 15a). Without any citation or reference to the fact that the earlier panel in *Transaero I* had specifically found that the EDNY had satisfied the factual and legal findings required by Section 1608(e) of the

FSIA prior to entering judgment, the panel in *Transaero V* also held that a:

> "determination of personal jurisdiction should not be made preclusive when made upon the grant of a default judgment. This is particularly so when the defendant has raised the jurisdictional issue in its first appearance in another forum where the plaintiff seeks enforcement of the default judgment."

App. A, at 14a.

Reaching an opposite conclusion to that of the EDNY, the panel in *Transaero V* then held that a collateral estoppel effect had to be given to the D.C. Circuit's majority decision in *Transaero II* and vacated the 1989 judgment on the grounds that the D.C. Circuit had found that it was void. Although Judge Mishler of the EDNY had held that the application of this Court's rules of res judicata and collateral estoppel in this case was similar to this Court's seminal decision in *American Surety Company v. Baldwin,* 287 U.S. 522 (1931), the panel in *Transaero V* failed to discuss this analysis or this Court's decision in that or a number of the other cases relied upon by the EDNY to hold that the judgment remained valid notwithstanding the D.C. Circuit's split decision in *Transaero II.*

Transaero filed a timely petition for rehearing and suggestion for rehearing *en banc.* That petition was denied on January 21, 1999. (App. B). This petition for a writ of certiorari follows.

REASONS FOR GRANTING THE WRIT

The Second Circuit panel in *Transaero I* noted that "[c]ourts go to great lengths ... to permit [default] judgments against foreign sovereigns to be set aside." 24 F.3d at 462. (App. K at 100a.) The panel in *Transaero V* has gone too far in its efforts to achieve this result. This case presents fundamental questions

of jurisdiction and the finality of judgments, especially default judgments, entered against foreign governments pursuant to the provisions of the Foreign Sovereign Immunities Act. It also presents fundamental questions concerning the consistency of opinions and the deference that two different federal appellate courts must give to their conflicting decisions addressing the same question of jurisdiction in simultaneous and concurrent proceedings in the same case; the deference that subsequent panels of the same appellate court must give to earlier decisions rendered by different panels in the same case; and the proper application of the Federal Rules of Civil Procedure and this Court's jurisprudence of res judicata and collateral estoppel to efforts by all defendants and judgment debtors, not just foreign governments, to set aside default judgments that have been entered against them.

I. The decision in *Transaero V* has decided an important question of federal law with the respect to the entry of default judgments against foreign governments in a way that conflicts with the relevant decisions of this Court.

This Court should grant the petition because it raises important questions concerning the res judicata effect of default judgments entered against a foreign government pursuant to the Foreign Sovereign Immunities Act after a foreign government has litigated and lost a subject matter jurisdiction challenge seeking to set aside the judgment at the appellate court level and after the appellate court has held that the district court has satisfied the requirements established by Congress for entering default judgments against foreign sovereigns.

Under 28 U.S.C. §1608(e), a district court may not enter a default judgment against a foreign government pursuant to the provisions of the FSIA unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. In

entering the default judgment against the Air Force in 1989, the EDNY specifically made such a ruling, finding that personal and subject matter jurisdiction existed. (App. G.) The Second Circuit panel in *Transaero I* specifically affirmed that the EDNY had satisfied the requirements of Section 1608(e). In so doing, the panel in *Transaero I* noted that the requirements of Section 1608(e) are identical to those governing judgments against the United States under F.R.C.P. 55(e), and that the purpose of the evidentiary requirement is "to assure that foreign sovereigns, who sometimes are slow to respond to legal action, are protected from unfounded claims." 24 F.3d at 462 (App. K at 98a)

The panel in *Transaero I* then explicitly held that:

> "no such concerns exist in this case because Judge Mishler held an inquest on the question of damages, and his Order of April 21, 1989, directing entry of the default judgment, determined specifically that the complaint "state[d] a cause of action, based on breach of contract,' the claim "f[ell] within the 'commercial activities' exception to the Foreign Sovereign Immunities Act" and was "supported by the proof submitted." 24 F.3d at 462 (App. K at 99a).

Earlier in its decision, the *Transaero I* panel had further noted that Judge Mishler's April 21, 1989 Order had explicitly held that the Air Force had been properly served pursuant to the FSIA and had notice of the action. 24 F.3d at 459 n.1. (App K at 92a).

In reversing the two subsequent decisions of the EDNY holding that the ruling in *Transaero I* was the law of the case that had made the question of jurisdiction res judicata, the Second Circuit panel in *Transaero V* held that because it was a default judgment the original 1989 Section 1608(e) ruling by the EDNY should not be given a res judicata effect,

notwithstanding the earlier panel's decision in *Transaero I and III* refusing to set aside the EDNY's 1989 judgment and specifically affirming that the district court's rulings in entering judgment had satisfied Section 1608(e).

This Court has consistently held that a default judgment has the same res judicata effect as a judgment that has been entered after trial.[5] In holding to the contrary, without citation to any binding authority, the panel decision in *Transaero V* has clearly decided an important question of federal law which is contrary to this Court's governing law as well as the decisions of the earlier panel in *Transaero I* and *III* that the 1989 judgment should not be set aside because it satisfied the legal and factual findings required by 28 U.S.C. 1608(e) under the FSIA.

As a practical matter, the panel decision in *Transaero V* effectively renders both Section 1608(e) and the FSIA a nullity. In enacting the FSIA and Section 1608(e), Congress clearly anticipated that default judgments would be entered against foreign governments. An appellate court that has refused to set aside a default judgment entered against a foreign government and has instead affirmed that the district court conducted the necessary inquiry and made the Congressionally required findings to support jurisdiction and the entry of such a judgment has clearly held that a proper and valid default judgment has been entered. To hold as the subsequent panel has in *Transaero V* that neither the original entry of judgment nor the appellate decision refusing to set aside that entry has any binding precedential effect in subsequent proceedings to enforce the judgment is to render meaningless the entire

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[5] *See, e.g., Riehle v. Margolies*, 279 U.S. 218, 225, 49 S.Ct. 310 (1929); *Morris v. Jones*, 329 U.S. 545, 550-551, 67S.Ct. 451 (1947); *Last Chance Mining Co. v. Tyler Mining Co.*, 157 U.S. 683, 691-692 (1895).

purpose of Section 1608(e) and the statutory scheme enacted by Congress. If this were truly the law, no foreign government would ever have to enter an appearance or litigate the merits of its case, because no matter how valid the entry of the default judgment entered against it, or extensive an appellate ruling upholding the entry of that judgment, the foreign government could simply continue to argue that the judgment itself has no binding precedential effect because it is a default judgment.

This Court should grant the petition and reverse the decision in *Transaero V* to clarify that when subsequently left undisturbed after review by an appellate court, district court determinations under the Foreign Sovereign Immunities Act pursuant to 1608(e) resulting in default judgments against foreign governments have a res judicata effect in subsequent proceedings to enforce the judgment.

II. In its efforts to "go to great lengths to set aside"a valid default judgment, the decision of the panel in *Transaero V* has so far departed from the accepted and usual course of judicial proceedings as established by the decisions of this Court and the Federal Rules of Civil Procedure as to call for the exercise of this Court's supervisory power.

The panel decision in *Transaero V*, as did the D.C. Circuit's majority decision in *Transaero II*, demonstrates the inherent conflict between this Court's jurisprudence and the great lengths to which the panel in *Transaero I* noted courts will go to permit [default] judgments against foreign sovereigns to be set aside. 24 F.3d 457, 462 (App. K at 100a). This Court should grant the petition and exercise its supervisory power over this case because in its effort to set aside a default judgment entered against a foreign government, the panel decision in *Transaero V* has both ignored and misapplied both this Court's binding precedent as well as the explicit provisions

of FRCP 12(g) and (h) and the prior Second Circuit panel's decisions in *Transaero I* and *III*.

In order to set aside a valid default judgment entered in this case, both the panel in Transaero V and the majority of the D.C. Circuit have gone far beyond the established and acceptable limits of jurisprudence. In a decision which the dissent stated appeared to reflect the personal international policy preferences of the judges as opposed to the governing law, the majority of the D.C. Circuit: (a) refused to grant the appropriate deference to Congress as to the proper meaning and interpretation of the FSIA; (b) ignored prior representations of the BAF as to its legal status in other federal court proceedings; and (c) refused to exercise its Article III constitutional obligation to address the res judicata effects of an earlier court decision in the case commenced by the Air Force in a sister circuit in 1993 because Transaero had allegedly failed to perform the impossible task of raising that issue in the 1992 lower court proceedings in the District of Columbia.

Whether the majority in the D.C. Circuit's decision in *Transaero II* correctly decided the proper legal interpretation of the FSIA service provisions is not an issue presented by this petition. However, the res judicata effect of the D.C. Circuit's majority decision in the Second Circuit is an issue. In holding that the EDNY had incorrectly refused to give a res judicata effect to the D.C. Circuit's majority decision, the panel in *Transaero V* has failed to adequately explain or reconcile the fact that some four years earlier an earlier panel of the Second Circuit had specifically asked the parties to brief the identical legal question and had declined to follow the D.C. Circuit's majority decision or set aside its earlier decision in *Transaero I* or the 1989 default judgment.

As the two reversed EDNY decisions correctly held, by any interpretation of this Court's jurisprudence the decisions in

Transaero I and *III* made the question of jurisdiction res judicata in favor of a valid judgment, once the Second Circuit panel in *Transaero I* reviewed the D.C. Circuit's decision in *Transaero II* and decided that it would leave both *Transaero I* and the 1989 judgment intact. By slightly broadening its limited mandate on remand instructing the EDNY to re-examine the mathematical accuracy of its calculation, the Second Circuit panel in *Transaero I* and *III* clearly held that the 1989 judgment was jurisdictionally valid.

This Court's precedent clearly holds that an appellate court that has knowledge that another court has declared a judgment jurisdictionally void; requests a briefing on whether it should also declare the judgment void; and then refuses to do; has made a clear and binding ruling on the legal effect of the other court's ruling.

This Court has held that when two courts are addressing issues which have an identity of parties and issues, the first and final judgment becomes *res judicata* on the second court's proceedings, even if the issue involved is personal jurisdiction.[6] The first such ruling in this case was that of the Second Circuit panel in *Transaero I.*

In holding that the earlier panel decisions in *Transaero I* and *III* did not render the question of jurisdiction res judicata, the panel in *Transaero V* has failed to follow this Court's repeated admonitions that the existence of jurisdiction and the adherence to orderly procedure are essential to the constitutional authority of Article III courts to decide cases brought before them. Federal courts must implicitly and explicitly satisfy themselves that jurisdiction exists prior to rendering judgment. Even if the parties concede jurisdiction, this Court has repeatedly held that

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[6] *Chicago, Rock Island & Pacific Railway Company v. Schendel*, 270 U.S. 611 (1925).

the judiciary has an independent obligation to satisfy itself that jurisdiction exists. [7]

Objections to personal jurisdiction are subject to waiver if not timely raised and litigated.[8] Such waiver may occur either by failing to note the defense or - as in this case - raising the objection but then submitting the issue for resolution by conduct. *Neirbo Company v. Bethlehem Shipbuilding Corporation*, 308 U.S. 165, 168 (1939). Federal Rules of Civil Procedure 12(g) and 12(h) are to the same effect, warning litigants that seasonable challenges to jurisdiction must be raised and litigated in a consolidated motion upon the first substantive appearance and motion, otherwise the challenge is waived.

When, during the pendency of its appeal before the D.C. Circuit, the Air Force returned to the courts of the Second Circuit to bring its concurrent challenge to the validity of the 1989 default judgment, it of necessity also had to raise its personal jurisdiction challenges to the validity of that judgment in those courts or have them explicitly or implicitly waived. Indeed, under FRCP 60(b), the Air Force had to explain why it was four years late in bringing its motion to set aside the judgment. Lack of notice was the excuse. [9]

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[7] *Stoll v. Gottlieb*, 305 U.S. 165 (1938); *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371 (1940); *Bender v. Williamsport Area School District*, 475 U.S. 534, 541 (1986); Mitchell v. Mauerer, 293 U.S. 237, 244 (1934); *United States v. Corrick*, 298 U.S. 435, 440 (1936).

[8]. *Insurance Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 706 (1982).

[9] *Insurance Corp. of Ireland, Ltd., v. Compagnie Des Bauxites De Guinea*, 456 U.S. 694 (1982); *Baldwin v. Iowa State Traveling Men's Association*, 283 U.S. 522 (1931); *Davis v. Davis*, 305 U.S. 32 (1938);

In holding that the earlier panel decisions in *Transaero I* and *III* did not address these issues, the panel in *Transaero V* has ignored both explicit and implicit holdings to the contrary. Judge Mishler explicitly held in 1993 - as he had done in 1989 - that subject matter jurisdiction existed over the Air Force and the arguments was raising in 1993 were those "which it could have brought in 1989 but chose not to." The Second Circuit in *Transaero I* affirmed this 1993 ruling and also rejected the Air Force's lack of notice argument by noting the EDNY's independent 1989 finding of proper jurisdiction. Under the law of the case established by the decision in *Transaero I*, and the subsequent refusal by the same panel to set aside that decision in light of *Transaero II*, the EDNY correctly held that the appeal before the D.C. Circuit was thus barred on *res judicata* grounds once the Second Circuit had issued its decision.

At issue in this case is not simply the misapplication of this Court's jurisprudence, but, more importantly, whether the federal judiciary may violate their Article III obligations by freely ignoring the law written by Congress; the Federal Rules of Civil Procedure; and this Court's precedent simply because a foreign sovereign is seeking to set aside a default judgment that it knowingly and consciously took in an ordinary commercial dispute with a U.S. corporation.

The Air Force in this case deliberately bifurcated its jurisdictional challenges in two different federal circuits in its effort to set aside the default judgment entered against it. This Court has recognized that dissatisfied litigants often seek

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Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371 (1939); *American Surety Company v. Baldwin*, 287 U.S. 156 (1931). *See, Gleason v. Jandrucko*, 860 F.2d 556, 560 (2d Cir. 1988) ("fraud on the court" requires moving party to show that there was no opportunity to have the grounds it relied upon to set aside the judgment fully litigated in the original action).

second opinions from different judges, with the hope that another judge with different opinions or biases will interpret the law or facts more favorably to the litigant. It has held that without finality or adherence to the established law of the case, "there would be no end to a suit if every obstinate litigant could, by repeated appeals, compel a court to listen to criticisms on their opinions, or speculate of changes from changes of its members." [10]

This Court has also admonished that fundamental fairness and the public interest in the administration of justice is best achieved through judicial adherence to well-established and evenhandedly applied rules of jurisdiction and procedure, not abstract and personal notions of fairness reflecting "any individual judge's ad hoc determination of the equities in a particular case."[11]

In enacting Section 1608(e), Congress clearly anticipated that default judgments would be entered against foreign governments. Unfortunately, as both the panel in *Transaero I* noted and the dissent implied in *Transaero II*, simply because a foreign government is involved federal judges are often inclined to place their own ad hoc determinations of the equities of a particular case over the law. They go to great lengths to set aside what in any other case would be a valid default judgment. Foreign governments such as Bolivia are adept at bringing suit in the federal court system and, alternatively taking and challenging default judgments. *See, e.g., Practical Concepts, Inc. v. Republic of Bolivia,* 811 F.2d 1543 (D.C. Cir. 1987). Carving out an exception to the rules of

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[10] *Robert v. Cooper,* 61 U.S. (20 How.) 467, 481 (1857). *Also see, In Re Sanford Fork & Tool Co.*, 160 U.S. at 247.

[11] *Federated Department Stores, Inc. v. Moite,* 452 U.S. 394, 401-402 (1981).

procedure and jurisprudence that would otherwise normally govern the proper method by which such judgments may be challenged not only defeats the purpose of the FSIA but - as the tortured ten year history of this litigation demonstrates - ultimately undermines the integrity of this Court's jurisprudence and the laws established by Congress.

III. The panel's decision in Transaero V has created a split with the D.C. Circuit on whether a foreign government may effectively preserve a challenge to personal jurisdiction under Federal Rule of Civil Procedure 12(g) and (h) by mere reference to the issue in its pleadings without also fully litigating the challenge in its first defensive move.

Contrary to the panel decision in *Transaero V*, the D.C. Circuit has reached the opposite conclusion and held that a foreign government sued pursuant to the provisions of the FSIA waives its right to challenge service of process or the exercise of personal jurisdiction if it merely references in its pleadings the potential absence of personal jurisdiction without also complying with the provisions of FRCP 12(g) and (h) and seasonably asserting and litigating its challenge in its first substantive motion challenging the exercise of jurisdiction over it. *See, Foremost-McKesson, Inc., v. The Islamic Republic of Iran*, 905 F.2d 438, 452-453 (D.C.Cir. 1990). This decision is similar to the 1995 and 1997 decisions of the EDNY reversed by *Transaero V.* There is a conflict between the D.C. and Second Circuits on this issue.

The conclusions of the EDNY and the D.C. Circuit on this issue comport with both the actual wording and spirit of F.R.C.P. 12(g) and (h), since it requires a foreign government - like all litigants - to litigate its challenges to the exercise of jurisdiction over it at the start of any proceeding. As the tortured procedural history of this case amply illustrates, the

contrary decision of the Second Circuit panel in *Transaero V* that a foreign government may effectively bifurcate its challenges to a four-year old default judgment and preserve its challenge to allegedly invalid service of process while litigating its challenge to subject matter jurisdiction in two different circuits creates exactly the type of forum shopping and piecemeal litigation that has been consistently condemned by both this Court and the Federal Rules of Civil Procedure. Left undisturbed, it will encourage defendants such as the government of Bolivia to bring multiple and piecemeal challenges to default judgments, in an effort to increase their chances that they may eventually find a sympathetic judge or appellate court that will be willing to set aside the judgment, or, alternatively, indefinitely delay the enforcement of a valid default judgment.

CONCLUSION

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDICES

Appendix A

Opinion of the
United States Court of Appeals for the Second Circuit,
Transaero, Inc. v. La Fuerza Aerea Boliviana,
162 F.3d 724 (2nd Cir. Dec. 11, 1998)
("*Transaero V*")

Appendix A
(Transaero V)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 1997

(Argued: July 13, 1998 Decided: December 11, 1998)

Docket Nos. 97-9317, -9327

TRANSAERO, INC.,
Plaintiff-Appellee-Cross-Appellant,

- v. -

LA FUERZA AEREA BOLIVIANA,
an agency or instrumentality of the
Republic of Bolivia, a Foreign State,
Defendant-Appellant-Cross-Appellee.

Before: MINER and CABRANES Circuit Judges,
and CHATIGNY, District Judge.*

Appeal and cross-appeal from an amended default judgment entered in the United States District Court for the Eastern District of New York (Mishler, J.) in favor of plaintiff for money owed pursuant to a credit agreement, the court having

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* The Honorable Robert N. Chatigny, of the United States District Court for the District of Connecticut, sitting by designation.

found that defendant had waived the defenses of improper service of process and lack of personal jurisdiction by appearing on a motion to vacate the original judgment on other grounds during the pendency of an appeal in the United States Court of Appeals for the District of Columbia Circuit challenging enforcement of the original judgment, which the D.C. Circuit ultimately held void for failure to complete proper service of process upon defendant as a foreign state.

Judgment reversed; cross-appeal dismissed.

ANDREW M. DANAS,
Grove, Jaskiewicz and Cobert,
Washington, DC
(Ronald N. Cobert, of counsel),
for Plaintiff-Appellee-
Cross-Appellant.

JONATHAN P. GRAHAM,
Williams & Connolly,
Washington, DC
(Jonathan L. Marcus, of counsel),
for Defendant-Appellant-
Cross-Appellee.

Miner, Circuit Judge:

Defendant-appellant-cross-appellee La Fuerza Aerea Boliviana (the Bolivian Air Force) (the "BAF") appeals from an amended default judgment entered in the United States District Court for the Eastern District of New York (Mishler, J.) in favor of plaintiff-appellee-cross-appellant Transaero, Inc. ("Transaero"). The amended judgment was entered after the

court denied a motion by the BAF for relief from the original default judgment awarding damages for money owed on a credit agreement. In denying the motion, the district court determined that the BAF had implicitly waived the defenses of improper service of process and lack of personal jurisdiction under the Foreign Sovereign Immunities Act ("FSIA"), see 28 U.S.C. §§ 1602 et seq., by previously appearing in the United States District Court for the Eastern District of New York (the "EDNY") and in this Court to argue for relief from the original judgment under the provisions of Fed. R. Civ. P. 60(b). When the BAF first appeared in the EDNY, its appeal from an order of the United States District Court for the District of Columbia enforcing that judgment was pending in the United States Court of Appeals for the District of Columbia Circuit (the "D.C. Circuit"). The order subsequently was reversed by the D.C. Circuit, which held that Transaero could not enforce the judgment it previously obtained in the EDNY because it had not complied with the FSIA in regard to service of process.

Transaero cross-appeals from various orders of the EDNY and from the judgment as amended. The amendment reduced the original award from $983,696 to $336,232.

For the reasons that follow, we reverse the amended judgment entered in the EDNY and dismiss the cross-appeal.

BACKGROUND

The extensive background of this action is set out in our three previous opinions dealing with this litigation, see Transaero, Inc. v. La Fuerza Area [sic] Boliviana, 24 F.3d 457 (2d Cir. 1994) ("Transaero I"); Transaero, Inc. v. La Fuerza Aerea

Boliviana, 38 F. 3d 648 (2d Cir. 1994) (Transaero III"); Transaero, Inc. v. La Fuerza Aerea Boliviana, 99 F. 3d 538 (2d Cir. 1996) ("Transaero IV"), cert. denied, 117 S. Ct. 1843 (1997), as well as the opinion of the D.C. Circuit, see Transaero, Inc. v. La Fuerza Aerea Boliviana, 30 F. 3d 148 (D.C. Cir. 1994) ("Transaero II"). We presume familiarity with each of those opinions and recount here only those facts most pertinent to the resolution of this appeal.

This suit arose out of the alleged failure of the BAF to pay Transaero, a New York corporation and supplier of aircraft parts, the interest it was due under a credit agreement entered into in May of 1981. The credit agreement, which provided the BAF with an open account up to $350,000, required the BAF to pay its balance in full within 120 days of product shipment. The credit agreement also provided that, if the BAF did not comply with this term, it was required to pay 1.75% monthly interest (21% annually) on the outstanding balance. By April of 1982, the BAF had accumulated an outstanding principal balance under the credit agreement of approximately $600,000.

In October of 1984, the BAF remitted approximately $382,000 to Transaero in partial payment, leaving roughly $216,000 of principal due. In January of 1986, after several weeks of negotiations assisted by the Economic Counselor of the United States Embassy in La Paz, the BAF paid to Transaero a total of $266,000. Transaero received this payment, specifically noting that $50,000 of the sum was in "partial compensation for interest payments." After this payment, the BAF made no further payments to Transaero, although Transaero continued to bill it for unpaid accumulated interest.

Appendix A
(Transaero V)

In 1988, Transaero sued the BAF in the EDNY, claiming it was owed $983,696.60 in outstanding compound interest and basing jurisdiction on the "commercial activity" exception to sovereign immunity under the FSIA, 28 U.S.C. §§ 1603(d), 1605(a)(2). The BAF failed to answer the complaint or otherwise appear in the action. The district court entered a default judgment on April 28, 1989 against the BAF in the full amount sought by Transaero, $983,696.60. In entering the default judgment, the court noted that the BAF was "properly served in accordance with 28 U.S.C. § [1]608(b)(3)(B)," as "an agency or instrumentality of a foreign state" under the FSIA. In June of 1992, Transaero sought to enforce the default judgment in the D.C. district court pursuant to 28 U.S.C. § 1963. The BAF appeared in the action and sought summary judgment denying enforcement of the default judgment, arguing that service was improper because it was not an "agency or instrumentality of a foreign state," which may be served under § 1608 (b) of the FSIA, but rather a "foreign state or political subdivision of a foreign state," which must be served under § 1608(a) of the FSIA. See 28 U.S.C. § 1608 (a). The D.C. district court denied the BAF's motion for summary judgment after finding that the BAF was "an agency or instrumentality of a foreign state," and thus subject to service under § 1608(b) of the FSIA.[1] See Transaero II, 30 F. 3d at 150. The BAF appealed that ruling to the D.C. Circuit. See id.

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1 Transaero served the Bolivian Ambassador and Consul General in Washington, D.C. and the Bolivian First Minister and the Bolivian Air Force in La Paz, Bolivia. See Transaero II, 30 F. 3d at 153. These methods were found by the court to be sufficient under § 1608 (b), but not under § 1608(a).

Appendix A
(Transaero V)

The BAF made its first appearance in the EDNY action in May of 1993, while the appeal was pending in the D.C. Circuit. It moved for relief from the judgment pursuant to Fed. R. Civ. P. 60(b), arguing that the default judgment should be set aside on several non-jurisdictional grounds, including fraud on the court. See Transaero I, 24 F. 3d at 459-60. Significantly, in its Rule 60(b) motion papers submitted to the EDNY, the BAF included the following footnote:

> The [BAF] has appealed [the D.C. district court]'s opinion. The [BAF] acknowledges that until overturned on its pending appeal, [the D.C. district court]'s opinion bars the [BAF] from challenging the propriety of service under the Foreign Sovereign Immunities Act. Although barred by res judicata from contesting it, the [BAF] in no way waives these issues. In this, its first responsive pleading, the [BAF] preserves its challenges to Transaero's improper service of process and this Court's lack of personal and subject-matter jurisdiction under the Foreign Sovereign Immunities Act . . . .

The EDNY denied the motion in August of 1993, and the BAF appealed to this Court. On appeal, the BAF included the same footnote in its brief. In May of 1994, we affirmed the EDNY's order denying the BAF's Rule 60(b) motion. See Transaero I, 24 F. 3d at 459. We noted in our opinion, however, that our review was limited to the issues raised in that motion and that the D.C. Circuit's decision, which would address the jurisdictional issues, was pending. See id. at 459,

459 n.1. We then remanded for factual findings concerning the calculation of interest. See id. at 462-63.

After this Court decided Transaero I, the BAF filed a petition for rehearing with this Court and sought, inter alia, to stay our mandate pending the D.C. Circuit's ruling. See Transaero III, 38 F. 3d at 649. While the petition for rehearing was pending, a divided panel in the D.C. Circuit overturned the decision of the D.C. district court, holding that BAF was a "foreign state" rather than an "agency or instrumentality of a foreign state" and that service upon the BAF should have been made pursuant to § 1608(a) of the FSIA, and not pursuant to § 1608(b). See Transaero II, 30 F. 3d at 153-54. Consequently, the D.C. Circuit held that the EDNY did not have personal jurisdiction over the BAF and the default judgment was therefore "void and unenforceable." Id. at 154.

After the D.C. Circuit issued its decision, we requested sua sponte that the parties brief the issue of whether we were now required to vacate the default judgment upon reconsideration of the BAF's Rule 60(b) motion. See Transaero III, 38 F. 3d at 650. After briefing on that issue, we noted that our review of the denial of the Rule 60(b) motion and our consideration of the petition for a rehearing were limited in scope. Specifically, we stated as follows:

> [I]t is by no means clear that [the] BAF's initial appeal had urged us to reverse the denial of the Rule 60(b) motion for lack of [effective] service. In short, we have now pending no open issue on which the preclusive effect of the D.C. Circuit's decision, if any, may operate.

> Therefore, without expressing any views as to (a) the validity of Transaero's service upon [the] BAF in initiating the Eastern District suit or (b) whether the default judgment is impaired by the allegedly late notice of its entry, we decline to grant the petition for rehearing just because the D.C. Circuit has ruled that the default judgment is not enforceable in the District of Columbia. We need not decide whether [the] BAF is entitled to pursue a new Rule 60(b) motion in the Eastern District, now that the D.C. Circuit has declared the default judgment to be void.

Transaero III, 38 F. 3d at 650.

Upon remand, the BAF filed a second motion for relief from the default judgment in the EDNY, now pursuant to Rule 60(b)(4). In this motion, the BAF claimed that the judgment was void for lack of proper service and that the ruling of the D.C. Circuit was a final resolution of that issue to which both parties are bound. In a Memorandum of Decision and Order dated August 4, 1995, the EDNY denied that motion, finding that the BAF had tacitly waived its service of process and personal jurisdiction defenses by (1) appearing in the EDNY to argue the first Rule 60(b) motion; (2) appealing the denial of that motion; and (3) seeking a rehearing of this Court's affirmance of the denial, all without arguing the jurisdictional issues. On August 22, 1995, the EDNY entered an order denying the BAF's motion for reconsideration and limiting discovery to Transaero's books and records for the determination of accrued interest. The BAF appealed. In

November of 1996, we dismissed the appeal without prejudice, holding that the denial of the Rule 60(b)(4) motion was not appealable for lack of a final judgment in this case. See Transaero IV, 99 F. 3d at 541-42.

On remand, in a Memorandum and Order dated January 16, 1997, the EDNY declined to revisit issues of personal jurisdiction or the validity of its original default judgment and addressed only the issues concerning the amount of the award. It reasoned that our affirmance of its entry of a default judgment in Transaero I and our refusal in Transaero III to give preclusive effect to the D.C. Circuit's holding meant that we had held implicitly that service was proper and that EDNY had personal jurisdiction over the BAF. The EDNY concluded that it was bound to follow this implicit holding under the law of the case doctrine.

In a Memorandum of Decision and Order dated September 18, 1997, the EDNY addressed issues concerning the amount of the award. It found that the legality of Transaero's practice of charging compound interest was within the scope of our mandate but determined that the mandate did not extend to the question of whether the payment in January of 1986 constituted a settlement. The EDNY then determined that Transaero was entitled only to accrued simple interest, rather than the compound interest it had been charging, and adjusted the award accordingly. Concurrent with the filing of the Memorandum of Decision and Order, the EDNY also filed an amended default judgment awarding Transaero "$336,232.06, together with interest from April 28, 1989 [the date of the initial default judgment] and its costs of action."

Appendix A
(*Transaero V*)

The BAF appeals from the September 18, 1997 judgment, arguing that the D.C. Circuit's opinion should be given preclusive effect and that it expressly preserved the defenses of improper service and lack of personal jurisdiction pending the D.C. Circuit decision. The BAF also argues that the EDNY erred in concluding that its mandate on remand did not require consideration of whether the payment in January of 1986 constituted a full settlement of its debt to Transaero.

The BAF's motion for a stay of the amended default judgment pending appeal in this Court was opposed by Transaero, which moved for dismissal of the appeal. Transaero argued that the BAF had waived its jurisdictional defenses by failing to argue them in the EDNY when it first appeared. We granted the BAF's motion for a stay but denied Transaero's motion for a dismissal of the appeal.

Transaero cross-appeals from the same judgment, finding error in the EDNY's (1) rulings on the interest calculation issues; (2) interpretation of our mandate to allow consideration of the legality of Transaero's practice of charging compound interest; and (3) order limiting discovery to Transaero's books and records on the issue of award calculation.

DISCUSSION

I. Standard of Review

We review district court rulings on Rule 60(b) motions for abuse of discretion. See SEC v. McNulty, 137 F. 3d 732, 738 (2d Cir. 1998); Israel v. Carpenter, 120 F. 3d 361, 365 (2d Cir. 1997), cert. denied, 118 S. Ct. 1049 (1998). "A district court

would necessarily abuse its discretion if it based its ruling on an erroneous view of the law or on a clearly erroneous assessment of the evidence." Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 405 (1990); see Nikon Inc. v. Ikon Corp., 987 F. 2d 91, 94 (2d Cir. 1993).

II. Preservation of Jurisdictional Defenses

The requirement that a court have personal jurisdiction is a due process right that may be waived either explicitly or implicitly. See Insurance Corp. of Ireland v. Compagnie Des Bauxites De Guinea, 456 U.S. 694, 703-05 (1982). "The actions of the defendant may amount to a legal submission to the jurisdiction of the court, whether voluntary or not." Id. at 704-705. Thus, when a defendant appears and challenges jurisdiction, it agrees to be bound by the court's determination on the jurisdictional issue. See id. at 706; Baldwin v. Iowa State Traveling Men's Ass'n, 283 U.S. 522, 525 (1931). It is equally clear, however, that a "defendant is always free to ignore the judicial proceedings, risk a default judgment, and then challenge that judgment on jurisdictional grounds in a collateral proceeding." Insurance Corp. of Ireland, 456 U.S. at 706; see Covington Indus. v. Resintex A. G., 629 F. 2d 730, 732-33 (2d Cir. 1980).

Waiver of the defenses of insufficiency of service of process and lack of personal jurisdiction is generally governed by Fed. R. Civ. P. 12(h)(1), which establishes that

> [a] defense of lack of jurisdiction over the person, . . . insufficiency of process, or insufficiency of service of process is waived . ..

> if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

Rule 12(h)(1) "advises a litigant to exercise great diligence in challenging personal jurisdiction . . . or service of process. If he wishes to raise [either] of these defenses he must do so at the time he makes his first significant defensive move . . . ." 5A Charles Allen Wright & Arthur R. Miller, Federal Practice and Procedure § 1391 (1990).

Transaero argues that, despite the footnote in the BAF's motion papers purporting to preserve them, the BAF waived its jurisdictional defenses by "volunt[eering] . . . to litigate the merits of the case." We disagree. We believe that the BAF properly preserved its service of process and personal jurisdiction defenses while awaiting the D.C. Circuit's decision.

By raising the defenses in its first responsive motion in the EDNY but not arguing them, the BAF steered a middle course between the res judicata effect of the D.C. district court's decision and the dictates of Rule 12(h)(1). Under the liberal pleading rules of Rule 8, a party need only state these defenses in its first responsive filing and is not required to "articulate [] [them] with any rigorous degree of specificity." Kulzer v. Pittsburgh-Corning Corp., 942 F. 2d 122, 125 (2d Cir. 1991); see Holzsager v. Valley Hosp., 646 F. 2d 792, 795-96 (2d Cir. 1981). At the time of the motion, the BAF was precluded from arguing the propriety of service of process or personal jurisdiction because the D.C. district court decision on these

issues was entitled to res judicata effect pending the D.C. Circuit's decision on appeal. See Petrella v. Siegel, 843 F. 2d 87, 90 (2d Cir. 1988).

Under the circumstances, the BAF's appearance in the EDNY to attack the validity of the judgment on non-jurisdictional grounds cannot be deemed a waiver. Instead, by appearing in the EDNY to argue its initial Rule 60(b) motion, the BAF generally adhered to our instruction that when an appeal in a closely related action is pending, the current litigation may go forward until that appeal is decided. After the appellate court renders its decision, the district court should address the effect of the appellate court's decision in the related proceedings. See Petrella, 843 F. 2d at 90 ("The district court may retain jurisdiction following proceedings below in order to act on any motion arising from a reversal of the [trial] court's judgment by the appellate [court], but proceedings in the meantime should go forward, with preclusive effect given to the [trial] court's determination . . . .") (citation omitted).

Transaero also argues that, in entering the initial default judgment, the EDNY either implicitly or explicitly determined that it had jurisdiction over the parties, thus conclusively resolving that issue for further proceedings. We disagree. A determination of personal jurisdiction should not be considered preclusive when made upon the grant of a default judgment. This is particularly so when the defendant has raised the jurisdictional issue in its first appearance in another forum where the plaintiff seeks enforcement of the default judgment.

It is clear that a defendant may fail to appear, risk a default judgment, and then collaterally attack that judgment on

jurisdictional grounds. See Insurance Corp. of Ireland, 456 U.S. at 706-07; Covington Indus., 629 F. 2d at 732-33. A court entering a default judgment may assume that it has jurisdiction over the defendant when the defendant does not appear in court to contest the judgment, but that assumption does not preclude the defendant from later contesting jurisdiction in the enforcing court. See Baldwin, 283 U.S. at 525; Covington Indus., 629 F. 2d at 737. Thus, any determination by the EDNY that service was proper and that it had personal jurisdiction under the FSIA when it entered the initial default judgment in 1989 cannot be deemed final and preclusive on these questions.

Moreover, contrary to the EDNY's finding, the propriety of service of process or personal jurisdiction has not, until now, been properly before this Court. We have never ruled on those issues either expressly or implicitly. In Transaero I, we noted that our review of the Rule 60(b) motion was limited to the issues raised in that motion -- which did not include service of process or personal jurisdiction -- and recognized that the pending D.C. Circuit decision would address those issues. See Transaero I, 24 F. 3d at 459, 459 n.1. We stated in Transaero III that we were not expressing any views on the validity of Transaero's service upon the BAF in initiating the EDNY action and left open the possibility that the BAF might bring a Rule 60(b)(4) motion based upon the D.C. Circuit's decision. See Transaero III, 38 F. 3d at 650. In Transaero IV, holding that the EDNY order denying the BAF's Rule 60(b)(4) motion was a non-appealable, non-final order, we dismissed the appeal without prejudice to the BAF's right to appeal after a final order was entered. See Transaero IV, 99 F. 3d at 541-42.

III. Collateral estoppel or issue preclusion

The BAF argues that the D.C. Circuit's holding in Transaero II should control under the doctrine of collateral estoppel or issue preclusion. We agree.

The related doctrines of res judicata (claim preclusion) and collateral estoppel (issue preclusion) are meant to protect parties from having to relitigate identical claims or issues and to promote judicial economy. See Irish Lesbian & Gay Org. v. Giuliani, 143 F. 3d 638, 644 (2d Cir. 1998). "Res judicata bars litigation of any claim for relief that was available in a prior suit between the same parties or their privies, whether or not the claim was actually litigated." Id. Collateral estoppel bars a party from raising a specific factual or legal issue in a second action when the party had a full and fair opportunity to litigate the issue in a prior proceeding. See id. More specifically, collateral estoppel applies when

> (1) the issues in both proceedings are identical, (2) the issue in the prior proceeding was actually litigated and actually decided, (3) there was full and fair opportunity to litigate in the prior proceeding, and (4) the issue previously litigated was necessary to support a valid and final judgment on the merits. Liona Corp. v. PCH Assocs. (In re PCH Assocs.), 949 F. 2d 585, 593 (2d Cir. 1991).

The case at bar satisfies all four of these elements as they apply to the issues of service of process and personal jurisdiction under the FSIA. First, the BAF's Rule 60(b)(4)

motion raises the same FSIA service of process and personal jurisdiction issues raised in the enforcement action in the D.C. district and Circuit courts. Second, these issues were litigated to a final judgment entered by the highest court that will consider the case, the D.C. Circuit. See Transaero II, 30 F. 3d at 154, cert. denied, 513 U.S. 1150 (1995). Third, the litigation in the D.C. district and Circuit courts provided both parties with a full and fair opportunity to litigate the issues. Finally, the service of process and personal jurisdiction issues were necessary to support the D.C. Circuit's final judgment -- indeed, these issues were the subject of that judgment.

Accordingly, the D.C. Circuit's holding precludes any further litigation on these issues in this Circuit. We have examined the other contentions advanced by Transaero and find them to be without merit. We therefore reverse the amended default judgment in accordance with the foregoing and in reliance on the holding of the D.C. Circuit in Transaero II. We dismiss the cross-appeal as moot.

CONCLUSION

In sum, we hold that the BAF preserved its defenses of improper service of process and lack of personal jurisdiction when it appeared in the EDNY and in this Court to argue its first Rule 60(b) motion. Moreover, the D.C. Circuit's Transaero II decision, which holds that the default judgment is void and unenforceable, collaterally estops the courts of this Circuit from reconsidering the propriety of service of process or personal jurisdiction under the FSIA. The amended default judgment is reversed, and the cross-appeal is dismissed as moot.

Appendix B

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

CAROLYN CLARK CAMPBELL
CLERK

At a stated term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse, Foley Square, in the City of New York, on the twenty first day of January one thousand nine hundred and ninety-nine.

Transaero, Inc.,

Plaintiff-Appellee-Cross-Appellant,

Dkt Nos: 97-9317(L), 97-9327(XAP)

V.

La Fuerza Aerea Boliviana,

Defendant-Appellant-Cross-Appellee.

A petition for rehearing en banc having been filed herein by the appellee Transaero, Inc.

Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

FOR THE COURT
CAROLYN CLARK CAMPBELL, Clerk

By:
Beth J. Meador,
Administrative Attorney

Appendix C

Appendix C

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURT HOUSE
40 FOLEY SQUARE
NEW YORK 10007

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, Foley Square, on the 11th day of December, one thousand nine hundred and ninety-eight.

BEFORE: Hon. Roger J. Miner
Hon. Jose A. Cabranes
Circuit Judges
Hon. Robert N. Chatigny
District Judge*

Docket Nos. 97-9317, 97-9327

TRANSAERO, INC.,

Plaintiff-Appellee-Cross-Appellant,

-v-

LA FUERZA AEREA BOLIVIANA, an agency or instrumentality of the Republic of Bolivia, a Foreign State,

Defendant-Appellant-Cross-Appellee.

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* The Honorable Robert N. Chatigny, of the United States District Court for the District of Connecticut, sitting by designation.

Appendix C

Appeals from the United States District Court for the Eastern District of New York.

This cause came on to be heard on the transcript of record from the Eastern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby **ORDERED, ADJUDGED, and DECREED** that the judgment of said district court be and it hereby is reversed, and the cross-appeal is dismissed as moot in accordance with the opinion of this court.

FOR THE COURT
Carolyn Clark Campbell, Clerk
By:

_____
Arthur M. Heller
Administrative Attorney

Issued as Mandate Jan. 25, 1999

Appendix D

Appendix D
(Aug. 4, 1995 decision, EDNY)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

TRANSAERO, INC. 88-CV-2788

Plaintiff,

-against-

Memorandum of Decision and Order

LA FUERZA AEREA BOLIVIANA, an instrumentality of the REPUBLIC OF BOLIVIANA, a Foreign State,

Defendant.

August 4,1995

APPEARANCES:

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WILLIAMS & CONNOLLY

Appendix D
(Aug. 4, 1995 decision, EDNY)

Attorneys for Defendant
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Gregory B. Craig, Esq.
James W. Shannon, Esq.
Timothy S. Driscoll, Esq.

MISHLER, District Judge

Defendant, La Fuerza Aerea Boliviana ("the Air Force"), moves pursuant to Fed. R. Civ. P. 60(b)(4) to set aside the default judgment entered on April 28, 1989 and to dismiss the complaint solely because of the preclusive effect of the District of Columbia Circuit Court of Appeals' finding that this Court lacked personal jurisdiction. See Transaero, Inc. v. La Fuerza Aerea Boliviana, 30 F.3d 148, 154 (D.C. Cir. 1994), cert. denied, ____ U.S. ____, 115 S.Ct. 1101 (1995). Defendant also moves to stay all non-jurisdictional proceedings, pending the resolution of the motion to set aside the default judgment. Plaintiff, Transaero, Inc. ("Transaero"), moves to modify the default judgment pursuant to the mandate issued by the Second Circuit Court of Appeals on March 27, 1995. See Transaero, Inc. v. La Fuerza Aerea Boliviana, 24 F.3d 457 (2d Cir.), reh'g. granted in part, 38 F.3d 648 (2d Cir. 1994).

BACKGROUND

This case has a lengthy history and comes before us now in an unusual procedural context. Familiarity with this Court's Memoranda of Decision and Orders dated April 21, 1989 and August 12, 1993, the Second Circuit decisions Transaero, Inc.

v. La Fuerza Area Boliviana, 24 F.3d 457 (2d Cir. 1994) ("Transaero I") and Transaero, Inc. v. La Fuerza Area Boliviana, 38 F.3d 648 (2d Cir. 1994) ("Transaero III"), as well as the District of Columbia Circuit Court of Appeals decision Transaero, Inc. v. La Fuerza Aerea Boliviana, 30 F.3d 148 (D.C. Cir. 1994), cert. denied, 115 S.Ct. 1101 (1995) ("Transaero II"), is assumed. However, due to the complicated nature of this case we will briefly recite the pertinent facts and procedural posture.

This case originally arose out of an alleged breach of a credit agreement entered into between Transaero, a supplier of aircraft parts, and the Air Force in May 1981. The credit agreement created an open account upon which the Air Force could make purchases from Transaero. The agreement required the Air Force to pay interest of 1 3/4% per month (21% per annum) on all purchases not paid within 120 days of shipment. From June 22, 1981 until April 14, 1982, the Air Force ordered and accepted delivery of certain aviation equipment and thereby accumulated a principal balance of $598,115.76.

On or about September 8, 1988 Transaero filed a verified complaint seeking $983,696.60 in damages from the Air Force for: (1) "goods sold and delivered and accrued interest on the unpaid balance"; (2) "an account stated"; (3) "breach of the Finance Agreement"; and (4) "interest accruing on the unpaid balance of $598,115.76 for 86 months". The Air Force failed to serve or file an answer or enter an appearance.

Subsequently, Transaero moved for a default judgment. On March 30, 1989, we held a hearing on Transaero's motion for

a default judgment. Despite receiving adequate notice, the Air Force failed to appear. In a Memorandum of Decision and Order dated April 21, 1989, we granted Transaero's motion for default judgment finding that: (1) the summons and complaint were properly served upon the Air Force in accordance with a 2 U.S.C. § 2608 (b)(3)(B); (2) the Air Force had adequate notice of the hearing, but failed to enter an appearance; (3) the complaint stated a cause of action based on breach of contract for the Air Force's failure to pay amounts due and owing for the purchase and delivery of aviation equipment; (4) the Air Force was not entitled to Sovereign Immunity under the Foreign Sovereign Immunities Act (FSIA) because the activity of purchasing aviation equipment fell under the purview of the "commercial activities" exception to the FSIA, 28 U.S.C. § 1605(a)(2); and (5) Transaero's claim was supported by the proof submitted. The Clerk of the Court entered the default judgment on April 28, 1989.

In 1991, Transaero, in order to enforce the judgment, registered the default judgment in the district court for the District of Columbia under 28 U.S.C. § 1963 (Supp. IV 1992) and served a set of interrogatories under Fed. R. Civ. P. 69. The Air Force entered an appearance and collaterally attacked this Court's default judgment, arguing that the rendering court lacked personal jurisdiction. Specifically, they sought summary judgment to quash the interrogatories and dismiss the proceedings on the ground that the Air Force had not been served in compliance with § 1608(a) of the FSIA.

The late Judge Revercomb of the District Court for the District of Columbia denied the summary judgment motion in

an order dated September 25, 1992. In that order, the court found: (1) that the Air Force was served pursuant to § 1608(b) of the FSIA; (2) that the Air Force received actual notice of the lawsuit; and (3) that the Air Force was notified by mail of this Court's hearing on Transaero's motion for default judgment. Judge Revercomb then held, as a matter of law, agreeing with this Court, that the Air Force was an "agency or instrumentality" of the Republic of Bolivia and, thus, that service under § 1608(b) of the FSIA was proper. The Air Force then immediately appealed the interlocutory ruling by Judge Revercomb to the District of Columbia Circuit Court of Appeals. See Foremost-McKesson, Inc. v. Islamic Republic of Iran, 905 F. 2d 438, 433 (D.C. Cir. 1991) (denial of claim of sovereign immunity subject to interlocutory appeal under ambit of "collateral order doctrine").

While the D.C. Circuit appeal was pending, the Air Force's new counsel, Williams & Connolly, entered an appearance in the Eastern District of New York, on May 10, 1993, and filed a Fed. R. Civ. P. 60(b) motion to set aside the default judgment. The Air Force argued to vacate the default judgment because the sworn affidavit executed by Transaero's counsel allegedly contained numerous misrepresentations of law and fact which constituted a fraud upon this Court. The Air Force also challenged the subject matter jurisdiction of this Court to enter the default judgment. We denied the Rule 60(b) motion on August 12, 1993 and the Air Force appealed that ruling to the Second Circuit.

On May 19, 1994, the Second Circuit affirmed our denial of the Rule 60(b) motion. Transaero I, 24 F.3d 457 (2d Cir.

1994). The Second Circuit rejected the claim of fraud on the court and the claim of lack of subject matter jurisdiction, holding that this Court did not abuse its discretion in denying the Air Force's application to set aside the default judgment under Rule 60(b) and remanded for the limited purpose of re-examining the mathematical accuracy of the award to Transaero.

On July 6, 1994, the Air Force filed a petition for rehearing with the Second Circuit. The petition primarily contended that the remand should include the consideration of the proper ending date for the running of interest. The Air Force also urged that the Second Circuit stay their mandate until the jurisdictional challenges have been adjudicated in the D.C. Circuit.

On July 29, 1994, while the petition for rehearing was pending in the Second Circuit, the D.C. Circuit decided the appeal from Judge Revercomb's ruling and reversed. Transaero II, 30 F. 3d 148 (D.C. Cir. 1994). By a divided vote, the D.C. Circuit ruled that the Air Force is a "foreign state" rather than an "agency or instrumentality of a foreign state" for purposes of service of process under the FSIA. Thus, although service may have been sufficient under § 1608(b), applicable to service on an agency or instrumentality of a foreign state, the D.C. Circuit ruled that service was not properly accomplished pursuant § 1608(a), applicable to service on a foreign state. The court concluded that the "Eastern District of New York lacked personal jurisdiction, and the default judgment registered in the District of Columbia was therefore void and unenforceable." Id. at 154. The Court then reversed and

remanded with directions to dismiss the proceedings. A petition for rehearing with a suggestion for rehearing in banc was denied on September 15, 1994.

The Second Circuit, in light of the D.C. Circuit's decision and as part of the petition for rehearing, "then invited the parties' views as to whether the default judgment should now be vacated." Transaero III, 38 F.3d at 650. On October 19, 1994 the Second Circuit denied the petition for rehearing on those grounds. After noting that the parties seemed to have flip-flopped their respective positions on the preclusive effect of the action in the District of Columbia the Second Circuit ruled that "whatever preclusive effect the decision might have on issues that are open for decision in any court, it is not a circumstance requiring us to grant [the Air Force's] petition for rehearing." Id. They further explained that there was then "pending no open issue on which the preclusive effect of the D.C. Circuit's decision, if any may operate." Id. They did, however, grant the petition for the limited purpose of broadening the remand to include consideration of the cessation of interest. The mandate was stayed until March 27, 1995.

DISCUSSION

We are now in the peculiar procedural posture whereby the District of Columbia Circuit Court of Appeals, in a collateral attack, has held that this Court lacked personal jurisdiction and decided that the default judgment registered in the District of Columbia was void and unenforceable, while the Second Circuit, in a direct attack, has affirmed the default judgment and remanded for the limited purpose of assessing the

mathematical accuracy of the default award. Judge Mikva astutely noted in his dissent in Transaero II that "we [the D.C. Circuit] tell the parties that the statute compels one result; federal courts in another jurisdiction [the Second Circuit] tell the same parties that the statute compels the opposite result. Between us, we have thoroughly muddled the law." Transaero II, 30 F. 3d at 155 (dissent).

As would be expected, the Air Force contends that we are bound by what they deem to be a successful collateral challenge to the personal jurisdiction of this Court over the defendant in the default proceeding. They assert that the D.C. Circuit's ruling that the Eastern District of New York lacked personal jurisdiction is res judicata on the issue and we must abide by it. Transaero, on the other hand, argues that we are bound by the Second Circuit mandate remanding the case for the limited purpose of deciding the mathematical accuracy of the default award. We now attempt to "unmuddle" the law.

THE AIR FORCE'S RULE 60(b) MOTION

Based on the D.C. Circuit decision, the Air Force now moves pursuant to Fed. R. Civ. P. 60(b)(4) to set aside the default judgment as void. Subsection four of Rule 60(b) is unique because relief is not discretionary if judgment is void and a meritorious defense is not necessary. Covington Industries, Inc. v. Resintex A.G., 629 F. 2d 730, 733 n.3 (2d Cir. 1980). Thus, the only issue to decide is whether this Court's default judgment is void in light of the D.C. Circuit's decision. The Air Force argues that the D.C. Circuit's holding that the 1989 default judgment "registered in the District of Columbia was

therefore void and unenforceable," Transaero II, 30 F.3d at 154, is owed preclusive effect in this Court and dictates that the complaint be dismissed. The Air Force further asserts that "[t]he only possible basis for refusing to give preclusive effect to the District of Columbia Circuit's judgment is that it lacked jurisdiction to decide the issue in the first place." Memorandum of Law in Support of Motion to Set Aside Judgment and Dismiss the Complaint at 7.

The issue then is whether the Air Force's Notice of Appearance in the Eastern District of New York, Rule 60(b) motion, appeal to the Second Circuit and petition for rehearing constituted an appearance which waived any objection to personal jurisdiction and barred any collateral attack. As discussed below, we find that the aforementioned actions taken by the Air Force constitute such an appearance.

Waiver of Personal Jurisdiction

The requirement of personal jurisdiction represents an individual right and therefore may be waived. Insurance Corp. v. Compagnie Des Bauxites, 456 U.S. 694, 703, 102 S.Ct. 2099, 2105 (1982). "A variety of legal arrangements have been taken to represent express or implied consent to the personal jurisdiction of the court." Id. at 703, 102 S.Ct. at 2105. A defendant's actions may amount to a legal submission to the jurisdiction of the court, whether voluntary or not. Id. at 704-05, 102 S.Ct. at 2105.

Appendix D
(Aug. 4, 1995 decision, EDNY)

The issue of waiver of personal jurisdiction is generally governed by Rule 12 of the Federal Rules of Civil Procedure. Rule 12(b) states, in pertinent part, as follows:

> Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (2) lack of jurisdiction over the person, . . . (4) insufficiency of process, (5) insufficiency of service of process . . . . A motion making any of these defenses shall be made before pleading if a further pleading is permitted. . . . Fed. R. Civ. P. 12(b).

"Under Rule 12(h)(1), if one of these defenses is not promptly asserted by motion or in the responsive pleading, it is waived." Santos v. State Farm Fire And Cas. Co., 902 F.2d 1092 (2d Cir. 1990). Rule 12(h)(1) states, in pertinent part, that "[a] defense of lack of jurisdiction over the person . . . is waived (A) if omitted from a motion in the circumstances described in subdivision (g), or (B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment made thereof permitted by Rule 15(a) to be made as a matter of course." Fed. R. Civ. P. 12(h)(1).

"Thus, the message conveyed by the present version of Rule 12(h)(1) seems quite clear. It advises a litigant to exercise great

diligence in challenging personal jurisdiction, venue, or service of process. If he wishes to raise any of these defenses he must do so at the time he makes his first significant defensive move -- whether it be by way of a Rule 12 motion or a responsive pleading." Wright & Miller, Federal Practice and Procedure: Civil 2d § 1391, at 752 (footnote omitted).

As noted above, after the final entry of default judgment issued by this Court, the Air Force filed a notice of appearance in the Eastern District of New York and a Fed. R. Civ. P. 60(b) motion attacking the default judgment. This Court denied the motion and the Air Force appealed the decision to the Second Circuit. At no time during these appearances did the Air Force object to the lack of personal jurisdiction.

The Air Force's Rule 60(b) motion to vacate the default judgment was its first significant defensive move. The failure to object to lack of personal jurisdiction or insufficient service of process resulted in the waiver of the objection. The conduct relied upon to find waiver can occur after entry of default. See Trustees of Cent. Laborers' Welfare Fund v. Lowery, 924 F. 2d 731, 733 (7th Cir. 1991). Several courts have found that a post-default judgment motion should be treated as an initial Rule 12 motion to dismiss for purposes of waiver under Rule 12(h)(1). See Lowery, 924 F.2d at 733 (citing J. Slotnick Co. v. Clemco Industries, 127 F.R.D. 435, 440-41 (D. Mass. 1989) (failure to raise challenge to service in first defensive move after entry of default results in waiver of that defense under Rule 12(h)(1)); Bally Export Corp. v. Balicar, Ltd., 804 F.2d 398, 405 (7th Cir. 1986) (objection to service of process waived for not asserting it in first Rule 60(b) motion to vacate default judgment for lack

of personal jurisdiction); O'Brien v. Sage Group, Inc., 141 F.R.D. 81, 83 (N.D. Ill. 1992), aff'g., 998 F.2d 1394 (7th Cir. 1993) (defendant's abandonment of their objection to validity of service in their Rule 55(c) motion to vacate default judgment resulted in waiver of right to contest validity of service, and with it all objections to personal service); Lichtenstein v. Jewelart, Inc., 95 F.R.D. 511, 513 (E.D.N.Y. 1982) (determination of a Rule 55(c) motion based on lack of jurisdiction over the defendant can and should be treated as initial motion to dismiss).

It is important to note that only after the Air Force's collateral attack was denied in the D.C. District Court, did the Air Force turn to this Court in the Eastern District of New York for relief on grounds other than personal jurisdiction and sufficiency of process. By appearing to contest the subject matter and to argue that there was a fraud on the court the Air Force consented to the jurisdiction of this court to hear the objections. It is axiomatic that a movant consents to personal jurisdiction, unless the movant is objecting to personal jurisdiction. Moreover, the Air Force appealed the adverse ruling of this Court to the Second Circuit. The Air Force's action is consistent with consenting to the court's personal jurisdiction.

In other words, if we had granted the Rule 60(b) motion the Air Force could not then argue that this Court lacked the personal jurisdiction to hear the merits or if the Air Force had won its appeal, and the default judgment was vacated, the Air Force would have been deemed to have waived personal jurisdiction for the remand on the merits. Thus, the failure to

object to lack of personal jurisdiction in the Rule 60(b) motion and in the appeal thereof resulted in a waiver of those objections. To hold otherwise would allow the defendant to assert jurisdictional and other objections at different stages of litigation and would violate both the letter and spirit of Rule 12(h)(1).

Collateral Attack

There is no doubt that "[a] defendant is always free to ignore the judicial proceedings, risk a default judgment, and then challenge that judgment on jurisdictional grounds in a collateral proceeding." Insurance Corp. of Ireland v Compagnie des Bauxites, 456 U.S. at 706, 102 S.Ct. at 2106 (citing Baldwin v. Traveling Men's Assn., 283 U.S. 522, 525, 51 S.Ct. 517 (1931)); see also Covington Industries, Inc. v. Resintex A.G., 629 F. 2d 730, 732 (2d Cir. 1980); Practical Concepts, Inc. v. Republic of Bolivia, 811 F. 2d 1543, 1547 (D.C. Cir. 1987). This is true whether the judgment was issued by a tribunal within the enforcing court's jurisdiction or by a court of a foreign jurisdiction, unless barred by the principles of res judicata. See Covington Industries, 629 F. 2d at 732 (citation omitted).

"On the other hand, if the defendant appears in the original action and contests the jurisdiction of the court over either the person or the subject matter . . . and that issue is decided against him, . . . the default judgment is not subject to collateral attack for lack of jurisdiction of either person or subject matter. Nor is it where he appears but fails to contest jurisdiction." Moore's Federal Practice ¶ 60.25[2], at 60-234 (emphasis

added) (footnotes omitted); see Baldwin, 283 U.S. at 525, 51 S.Ct. at 518; see also Moore's Federal Practice ¶ 55.09, at 55-64.

Thus, a defendant faced with a lawsuit who believes the court lacks personal jurisdiction has basically two choices. The defendant can appear, challenge personal jurisdiction and defend the suit on the merits. This will preserve the jurisdictional objection for direct appeal. Or the defendant can remain entirely aloof from the original proceeding and attack the default judgment collaterally. However, if it is later determined that the rendering court possessed proper jurisdiction, the defendant is foreclosed from arguing the merits. See discussion in Wright, Miller & Cooper, Federal Practice and Procedure: § 4430.

Originally, the Air Force strategically elected not to appear in the original proceeding in order to preserve its right to collaterally attack the default judgment. However, when the District of Columbia District Court denied the application, holding that there was personal jurisdiction in the Eastern District of New York, the Air Force shifted strategy. It entered an appearance and filed the Rule 60(b) motion. The Air Force was attempting to simultaneously attack the default judgment directly and collaterally.

However, the courts are in agreement that if the defendant appears and either loses a challenge or fails to make a challenge to the court's personal jurisdiction, a default judgment entered thereafter is res judicata on the issue of personal jurisdiction and the judgment is not subject to . . . collateral attack on that

ground." Moore's Federal Practice ¶ 55.09, at 55-64 (footnotes omitted). This is due, in large measure, to the principle that a court has jurisdiction to determine its jurisdiction. See Durfee v. Duke, 375 U.S. 106, 84 S. Ct. 242 (1963); American Surety Co. v. Baldwin, 287 U.S. 156, 53 S.Ct. 98 (1932) (filing motion to vacate in state court proceedings precluded federal collateral attack); Baldwin, 283 U.S. 522, 51 S. Ct. 517 (1931); see also Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d § 3536.

A "court has the authority to pass upon its own jurisdiction and its decree sustaining jurisdiction against attack, while open to direct review, is res judicata in a collateral action." Chicot County Drainage Dist. v. Baxter State Bank, 308 U.S. 371, 377, 60 S.Ct. 317, 320 (1940) (citing Stoll v. Gottlieb, 305 U.S. 165, 171, 59 S. Ct. 134, 137 (1938)). This is true even if the jurisdictional decision is erroneous. "After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined. There is no reason to expect that the second decision will be more satisfactory than the first." Stoll, 305 U.S. at 172, 59 S. Ct. at 138.

The facts of the instant case are similar to those in American Surety Co. v. Baldwin, 287 U.S. 156, 53 S.Ct. 98. In American Surety Co. v. Baldwin, a default judgment was issued by an Idaho State District Court against a surety company which had given a supersedeas bond on an appeal to the Supreme Court of Idaho. Three days after the entry of the judgment, the surety company filed a motion in that court to vacate and set aside the

judgment. The Idaho district court granted the motion to vacate, but the Supreme Court of Idaho reversed the order vacating the judgment. Id. at 162, 53 S.Ct. at 100. The surety company then petitioned for a rehearing. The petition was denied without opinion. Id. at 163, 53 S. Ct. at 100.

The surety company then sought to collaterally attack the enforcement of the Idaho state judgment in federal court. The surety company asserted that since the judgment against it was entered without giving it notice and the opportunity of a hearing on the merits, the judgment was void under the due process clause of the Fourteenth Amendment. Id. at 162, 53 S.Ct. at 100. The Court held that the federal remedy was precluded by the proceedings taken in state court. The surety company "was at liberty to invoke the federal remedy without first pursuing that provided by state procedure. But an adequate state remedy was available; and, having invoked that and pursued it to final judgment, the surety company cannot escape the effect of the adjudication there." Id. at 164-65, 53 S.Ct. at 101 (citations omitted). See also Stoll v. Gottlieb, 305 U.S. 165, 59 S.Ct. 134 (1938) (despite not appearing in initial action, Court reversed state collateral attack of federal bankruptcy judgment's jurisdiction because creditor moved to vacate federal judgment).

As the Court explained in American Surety Co. v. Baldwin, the Air Force had the opportunity to remain entirely aloof from the proceedings in the Eastern District of New York and then collaterally attack the default judgment in the District of Columbia on jurisdictional grounds. However, after facing defeat in the D.C. District Court, the Air Force made the

deliberate move of entering the Eastern District of New York to challenge the default judgment directly. Having invoked the adequate remedy in the Eastern District, the Rule 60(b) motion to vacate, the Air Force is precluded from pursuing a collateral attack. Id., 287 U.S. at 165, 53 S.Ct. at 101 (motion to vacate and the appeal from the order thereon were effective in conferring jurisdiction for the purpose of determining court's own jurisdiction). Further, it makes no difference that the Air Force instituted the collateral attack prior to making the Rule 60(b) motion to vacate. See Stoll, 305 U.S. 165, 59 S.Ct. 134.

A collateral attack on a default judgment is precluded if the party had the opportunity to raise a jurisdictional challenge, but failed to do so. Chicot County Drainage, 308 U.S. at 378, 60 S.Ct at 320. It is well settled that "[e]ven if a court does not expressly rule on matters relating to its exercise of jurisdiction, if the parties could have challenged the court's power to hear a case, then res judicata principles serve to bar them from later challenging it collaterally." Nemaizer v. Baker, 793 F.2d 58 (2d Cir. 1986). This principle was reaffirmed in Insurance Corp. v. Compagnie Des Bauxites, 456 U.S. at 702 n. 9, 102 S.Ct. at 2104 n.9 ("A party that has had an opportunity to litigate the question of subject-matter jurisdiction may not, however, reopen that question in a collateral attack upon an adverse judgment. It has long been the rule that the principles of res judicata apply to jurisdictional determinations -- both subject matter and personal.")

As discussed above, the Air Force waived any objection to personal jurisdiction when it filed its notice of appearance and motion to vacate. It had the opportunity to raise any objection

to personal jurisdiction. In denying that application, this Court had determined its own jurisdiction. That decision, which was appealed and affirmed, precluded any collateral attack on jurisdiction. Otherwise, the Air Force would be entitled to more than one bite from the proverbial apple.

Res Judicata

The D.C. Circuit noted in its opinion that "[w]e do not consider whether the Eastern District's ruling might bar the Air Force's attack on personal jurisdiction, for Transaero did not assert any form of preclusion in the District Court for the District of Columbia, and we have generally refused to raise the question sua sponte." Transaero II, 30 F. 2d at 150, n.1 (citations omitted).

However, Transaero could not have raised the issue in the D.C. District Court because at that time the Air Force was legitimately pursuing its collateral attack in the District of Columbia. In other words, at that time there was no ruling from the Eastern District. Only when the Air Force lost in the D.C. District Court did it file the Rule 60(b) motion in the Eastern District of New York. In this situation Professor Moore explains that "[i]n the case in which the judgment that constitutes the basis for a defense of res judicata is entered after judgment in parallel litigation and during the pendency of an appeal, its preclusive effect can be raised by a motion to affirm, or in the briefs." Moore's Federal Practice ¶ 0.408[1], at 112 (citing Cotton States Mutual Insurance Co. v. Anderson, 749 F. 2d 663, 665-66 (11th Cir. 1984) (preclusion issue not waived where it was presented on appeal)). Transaero did in fact argue

in its brief, in a letter, and in its petition for rehearing to the D.C. Circuit that the Rule 60(b) proceedings in the Eastern District of New York were dispositive of the matters before the D.C. Circuit. See Combined Reply of Plaintiff Transaero, Inc., at 12-13, n. 15 and Addendum B, at 8, n.15. Thus, the Air Force should have been precluded from continuing its collateral attack.

The last decision to be issued in this case was the Second Circuit decision granting the petition for rehearing "only to the limited extent of broadening the remand to include consideration of the cessation of interest . . . ." Transaero III, 38 F. 3d at 650. "Every Court in rendering a judgment tacitly, if not expressly, determines its jurisdiction over the parties and the subject matter." Stoll, 305 U.S., at 171-72, 59 S.Ct. at 137 (citing Chicago Life Ins. Co. v. Cherry, 244 U.S. 25, 29, 37 S.Ct. 492, 493 (1917)). The Second Circuit "declin[ed] to grant the petition for rehearing just because the D.C. Circuit has ruled that the default judgment is not enforceable in the District of Columbia." Transaero III, 38 F.3d at 650. The Second Circuit remanded the case for this Court to consider only the following three elements in determining the mathematical accuracy of the default award: (1) whether the interest started too early; (2) whether the interest rate exceeded the contract rate; and (3) the proper date for the cessation of interest. Thus, the Second Circuit's affirmation of the denial of the Rule 60(b) motion and its limited remand is preclusive on the issue of jurisdiction.[1]

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[1] Even a third, independent, court would be bound by the Second Circuit decision since a court should give res judicata effect to the last

Appendix D
(Aug. 4, 1995 decision, EDNY)

THE AIR FORCE'S MOTION TO STAY NON-JURISDICTIONAL PROCEEDINGS

The Air Force has moved this Court for an order staying all non-jurisdictional proceedings, pending this Court's resolution of the Air Force's motion to vacate the default judgment. The motion is denied.

TRANSAERO'S MOTION TO MODIFY THE JUDGMENT

Transaero moves, pursuant to the mandate from the Second Circuit, for an order "(1) affirming the accuracy of the original calculation of damages upon which the April 28, 1989 Judgment of this Court was based and (2) retroactively increasing the April 28, 1989 Judgment in the amount of $185,014.32, said amount to retroactively accrue interest from that date as the statutory rate for judgments and the new judgment amount being $1,168,710.93 as of April 28, 1989."

The Air Force asserts that it needs discovery relevant to the remanded issue of determining the mathematical accuracy of the default award. We find that the Air Force is entitled to discovery only relative to the limited issues on remand: (1) whether the interest started too early; (2) whether the interest rate exceeded the contract rate; and (3) what was the proper

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previous judgment entered. This governing rule is often referred to as the "last in time rule." See Americana Fabrics, inc. v. L & L Textiles, Inc., 754 F. 2d 1524, 1530 (9th Cir. 1985) (citing Treines v. Sunshine Mining Co., 308 U.S. 66, 75-88, 60 S.Ct. 44, 49-50 (1939)); See also Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction § 4404.

date for the cessation of interest. Transaero is directed to produce its books and records relating to the Air Force account. We direct the Air Force and Transaero to conduct expedited discovery to be completed on or before September 1, 1995. This Court will then conduct a hearing on these limited issues on Friday, September 15, 1995.

CONCLUSION

The Air Force's motion to vacate the default judgment as void for lack of jurisdiction, pursuant to Fed.R.Civ.P. 60(b), is DENIED. The Air Force's motion to stay non-jurisdictional proceedings is DENIED.

The Air Force and Transaero are ORDERED to conduct expedited discovery on the limited issues of the remand to be completed on or before September 1, 1995. The parties are further ORDERED to appear for a hearing to resolve the issues on remand, on Friday, September 15, 1995. We reserve decision on Transaero's motion to modify judgment until the hearing has been completed.

And it is SO ORDERED.

Jacob. A Mishler
UNITED STATES DISTRICT JUDGE

Appendix E

Appendix E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

TRANSAERO, INC. 88-CV-2788

Plaintiff,

-against- Memorandum of Decision and Order

LA FUERZA AEREA BOLIVIANA, an instrumentality of the REPUBLIC OF BOLIVIANA, a Foreign State,

Defendant. August 22, 1995

APPEARANCES:

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Appendix E

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James W. Shannon, Esq.
Timothy S. Driscoll, Esq.

MISHLER, District Judge

The Air Force of the Republic of Bolivia's Motion for Reconsideration and Motion for Stay of Proceedings is in all respects DENIED. The Court's direction for discovery is limited to the production by Transaero, Inc. of their relevant records. If during the trial of the issue there is good cause to believe other discovery is appropriate, the Court will consider it at the time.

And it is SO ORDERED.

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UNITED STATES DISTRICT JUDGE

Appendix F

Appendix F
(Jan. 16, 1997 opinion EDNY)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
_____X

TRANSAERO, INC. 88-CV-2788

Plaintiff,

-against- Memorandum And Order

LA FUERZA AEREA BOLIVIANA, an instrumentality of the REPUBLIC OF BOLIVIA, a Foreign State, January 16, 1997

Defendant.
_____X

APPEARANCES:

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Appendix F
(Jan. 16, 1997 opinion EDNY)

MISHLER, District Judge

A long and torturous procedural past finally brings this matter before the Court on remand from the Court of Appeals for the limited purpose of determining the accuracy of the monetary award due Transaero, Inc. ("Transaero"), arising from a breach of contract between it and defendant La Fuerza Aerea Boliviana, (the "Air Force"). Specifically, the Second Circuit directs that the Court determine the rate of interest, and the beginning and ending dates for the accrual of such interest on the principal balance due Transaero. See Transaero, Inc. v. La Fuerza Aerea Boliviana, 24 F.3d 457 (2d Cir. 1994); Transaero, Inc. v. La Fuerza Boliviana, 36 F.3d 648 (2d Cir. 1994).

Background

In May, 1981 a credit agreement between the Air Force and Transaero established an open account upon which the Air Force could purchase aviation equipment from Transaero. The agreement also provided that the Air Force would pay interest of 1:75% per month on all purchases not paid within 120 days of shipment. Between 1981 and 1982, the Air Force's purchases resulted in a principal balance of $598,115.76. Although the Air Force paid $648,15.76 on the debt during the next four years, Transaero sued on September 8, 1988 to recover the remaining $983,696.60 allegedly owed to it for outstanding principal and interest.

Procedural History

Appendix F
(Jan. 16, 1997 opinion EDNY)

The Air Force failed to answer the complaint or to enter an appearance. Transaero moved for a default judgment, and on March 30, 1989, a hearing was held on the motion. Despite receiving adequate notice, the Air Force failed to appear at such hearing. On April 21, 1989, Transaero's motion was granted, and the Clerk of the Court entered the judgment against the Air Force on April 28, 1989 for the amount requested. In 1991, Transaero sought to enforce the judgment, and registered it in the district court for the District of Columbia pursuant to 28 U.S.C. § 1963. The Air Force made its first appearance in that action and sought summary judgment opposing enforcement, arguing that the Air Force had not been properly served in compliance with § 1630(a) of the Foreign Sovereign Immunities Act ("FSIA"), Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended in scattered sections of 28 U.S.C.).

On September 25, 1992, Judge Revercomb denied the motion, holding that (1) the Air Force was properly served pursuant to § 1608(b) of the FSIA; (2) that the Air Force received actual notice of the lawsuit; and (3) that the Air Force was notified by mail of this Court's hearing on Transaero's motion for a default judgment. Judge Revercomb held, as a matter of law, that the Air Force was an "agency or instrumentality" of the Republic of Bolivia and that service under § 1608(b) of the FSIA was proper. The Air Force immediately appealed Judge Revercomb's decision.

While the D.C. Circuit appeal was pending, the Air Force entered its first appearance in the Eastern District of New York, on May 10, 1993, by its attorneys Williams & Connolly, making a motion pursuant to Rule 60(b) of the Federal Rules of Civil Procedure to vacate the default judgment. The Air

Force argued that the judgment was void because the sworn affidavit executed by Transaero's counsel in support of its motion for a default judgment allegedly contained numerous misrepresentations of law and fact, constituting a fraud upon the Court. The Air Force also challenged the subject matter jurisdiction of the Court maintaining that the matter was not ripe for judicial review, and also argued that extraordinary circumstances warranted vacating the judgment under the savings clause of Rule 60(b). The Air Force's motion was denied in all respects. See Transaero v. La Fuerza Aerea Boliviana, No. 88-CV-2788 (E.D.N.Y. August 12, 1993).

On appeal, the Second Circuit affirmed, finding no abuse of discretion in the denial of the Air Force's claim of fraud on the court. See Transaero v. La Fuerza Aerea Boliviana, 24 F.3d 457 (2d Cir. 1994) ("Transaero I"). Noting Transaero's failure to address the Air Force's claims regarding this Court's calculation of interest, the Second Circuit determined that there "remained two questions regarding the accuracy of the interest calculation on which the award to Transaero was based." Id. at 462-63. Accordingly, the Second Circuit remanded for consideration of the proper starting date for the running of interest and the correct interest rate to be used. The Air Force filed a Petition for Rehearing, asking the Court of Appeals, among other things, to hold its remand in abeyance until the D.C. Circuit decided the pending appeal and to expand the remand to include the termination date of the accrual of interest under the contract.

While the Air Force's Petition for Rehearing was pending in the Second Circuit, the District of Columbia Circuit reversed Judge Revercomb. Transaero v. La Fuerza Aerea Boliviana, 30

F.3d 148 (D.C. Cir. 1994) ("Transaero II"), cert. denied, 115 S. Ct. 1101 (1995). The divided panel, from which Chief Judge Mikva dissented, held that the Eastern District lacked personal jurisdiction over the Air Force under the FSIA because, although service of the complaint complied with the FSIA's provision for serving an agency or instrumentality of a foreign state (28 U.S.C. § 1608(b)), the Air Force was an alter ego of a foreign state and service upon it had to be in compliance with the more stringent requirements of 28 U.S.C. § 1608(a). The court therefore concluded that the entry of the default judgment in the Eastern District was "void and unenforceable." Id. at 154. Transaero's Petition for Rehearing, Suggestion for Rehearing En Banc, and Petition for Writ of Certiorari with respect to Transaero II were each denied.

After the D.C. Circuit's reversal in Transaero II, the Second Circuit, sua sponte, requested the parties to brief the issue of the preclusive effect of the D.C. Circuit's decision. Nonetheless, the Court of Appeals denied the Air Force's Petition "without expressing any views as to...the validity of Transaero's service upon BAF [the Air Force] in initiating the Eastern District suit...[or] whether BAF [the Air Force] is entitled to pursue a new Rule 60(b) motion in the Eastern District now that the D.C. Circuit has declared the default judgment to be void." Transaero v. La Fuerza Aerea Boliviana, 38 F. 3d 648, 650 (2d Cir. 1994) ("Transaero III"). However, the appeals court did broaden its mandate on remand to include a consideration of both the proper starting and ending dates for the assessment of interest.

Subsequently, the Air Force filed a second motion to vacate the default judgment with the Court, pursuant to clause (4) of

Rule 60(b), asserting that the default judgment was void for lack of proper service and that the ruling of the Court of Appeals for the District of Columbia was res judicata. In a Memorandum of Decision and Order dated August 4, 1995, in which this Court engaged in a thorough analysis of issues of personal jurisdiction, collateral attack, and res judicata, the Air Force's Rule 60(b)(4) motion was denied. Expedited discovery was ordered in preparation for a hearing to determine the proper interest rate and interest period to be used in calculating the award. See Transaero v. La Fuerza Aerea Boliviana, No. 88-CV-2788 (E.D.N.Y. August 4, 1995).

Once again, the Air Force appealed to the Second Circuit, which granted a stay of proceedings in this Court pending its decision. On November 6, 1996, the Second Circuit dismissed the Air Force's appeal without prejudice, on the grounds that it was without appellate jurisdiction, reasoning that a district court's denial of a Rule 60(b)(4) motion was not an appealable final order. See Transaero v. La Fuerza Aerea Boliviana, No. 95-7855 (2d Cir. Nov. 6, 1996) ("Transaero IV").

On November 19, 1996, the Air Force filed a Petition for Rehearing and Suggestion for Rehearing En Banc. The Second Circuit denied both requests on January 9, 1997.

Ironically, this labyrinth of appeals and petitions leads us back to the original questions the Second Circuit directed this Court to address on remand, namely the period and rate of interest accrued on the principal debt owed Transaero. An explanation of our arrival at this procedural posture requires the Court to engage in a discussion of the doctrine of the "law of the case."

Appendix F
(Jan. 16, 1997 opinion EDNY)

Discussion

The Law of the Case

The law of the case regulates judicial affairs before final judgment and was developed to maintain consistency and to avoid reconsideration of matters once decided during the course of a single lawsuit. See generally, Wright, Miller & Cooper, *Federal Practice & Procedure* § 4478 (1981). The doctrine has several branches. The first deals with decisions of a lower court that have been ruled upon an appeal. Under this branch, "the trial court is barred from reconsidering or modifying any of it prior decisions that have been ruled on by the court of appeals." U.S. v. Occio, 940 F.2d 753, 757 (2d Cir. 1991) (when an appellate court has decided an issue, the trial court, at a later stage in the litigation, is under a duty to follow the appellate court's ruling on that issue). Thus, "where issues have been explicitly or implicitly decided on appeal, this branch obligates the district court on remand, to follow the decision of the Court of Appeals." Day v. Moscow, 955 F.2d 807, 812 (2d Cir. 1992). Indeed, pursuant to this doctrine, "the district court's actions on remand should not be inconsistent with either the express terms or the spirit of the mandate." In Re Ivan Boesky Securities Litigation, 957 F.2d 65 (2d Cir. 1992).

Under the second branch of this doctrine, an appellate court may refuse to reexamine in a subsequent appeal of the same case, issues which were decided either explicitly or necessarily by implication in the prior opinion. See Occio, 940 F. 2d at 758; See Trans World Airlines v. Morales, 949 F. 2d 141, 144 (5th Cir. 1991). The principle, simply stated is "that when a

court has ruled on an issue, that decision should generally be adhered to by that court in subsequent stages of the same case." Occio, 940 F. 2d at 758. While this rule is not inviolate, absent cogent or compelling reasons to deviate, such as an intervening change in controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice, a court's prior ruling will be adhered to. See Occio, 940 F. 2d at 758 (internal citations omitted); U.S. v. Salerno, 932 F. 2d 117, 121 (2d Cir. 1991).

The first branch of the doctrine informs this Court's decision not to revisit the validity of the default judgment entered on April 28, 1989, but rather to deal exclusively with the question of calculating the interest rate on the monetary award, as directed by the Court of Appeals.

As discussed above, this Court's decision to sustain the validity of the default judgment entered against the Air Force was affirmed by the Second Circuit on appeal. See Transaero I. In its decision, the Second Circuit upheld the default judgment, finding that there was no abuse of discretion in refusing to vacate the default judgment and remanded for the sole purpose of calculating the interest rate accruing on the principal.

Moreover, contrary to the Air Force's contentions, the issue of personal jurisdiction relating to the propriety of service of process pursuant to the FSIA is not properly before this Court. Questions of jurisdiction were necessarily decided when the Second Circuit affirmed this Court's decision to deny the Air Force's motion to vacate, otherwise the Second Circuit would not have reached the merits and affirmed the decision to

enforce the default judgment. See Morales, 949 F. 2d at 144 (while prior opinion did not explicitly address defendants claim that the district court lacked subject matter jurisdiction, the necessary assumption was that the prior panel found subject matter jurisdiction or it would not have affirmed the preliminary injunction); Oneida Indian Nation of New York v. State of New York, 860 F. 2d 1145, 1151 (2d Cir. 1988) (since a reviewing court always has an obligation to satisfy itself of the existence of jurisdiction, this may be deemed an implicit approval of the district court's jurisdictional ruling).

With respect to the proceedings of the Court of Appeals for the District of Columbia in which a divided panel found that the default judgment entered in the Eastern District of New York was void for lack of personal jurisdiction, such decision has no preclusive effect upon this Court. This Court is bound only by the mandate of the Second Circuit.

The Second Circuit Court of Appeals could have amended its prior determination in light of the Transaero II; its obligation to adhere to its prior decisions is not inviolate. Under the second branch of the law of the case doctrine, a court may deviate from a prior ruling where, for instance, there is a need to correct a clear error, or to prevent manifest injustice. However, the Second Circuit, while presented with several opportunities to do so, chose not to amend its prior determination to comply with that of the D.C. Circuit. Quite the contrary, after inviting the parties to brief the issue of the preclusive effect of the D.C. Circuit's opinion, the Second Circuit refused to alter its prior ruling, stating:

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> Turning first to the significance of the D.C. Circuit's opinion on the pending petition, we conclude that whatever preclusive effect that decision might have on issues that are open for discussion in any court, it is not a circumstance requiring us to grant BAF's [the Air Force's] petition for rehearing.

Transaero III, 38 F.3d at 650.

This Court's decision and application of the law of the case is informed by a recent Second Circuit decision involving dissimilar facts, but analogous legal principles. In U.S. v. Chukwura, 101 F.3d 230 (2d Cir. 1996), Anthony Chukwura ("Chukwura") was excluded from the United States by an order (the "Departure Order") issued by the United States District Court for the Northern District of Georgia, as a condition of the supervised release portion of his criminal conviction. Subsequently, the Eleventh Circuit affirmed the validity of a Departure Order, pursuant to which the defendant Chukwura had already been deported and excluded from the United States.

When Chukwura was subsequently arrested in the United States at John F. Kennedy Airport and convicted in the Eastern District of New York of unlawful re-entry after deportation, he appealed his conviction, challenging the validity of the Departure Order affirmed by the Eleventh Circuit. The Second Circuit summarily and simply stated, "[o]ur disagreement notwithstanding, see U.S. v. Olvera, 954 F.2d 788, 793 (2d Cir. 1992), the Eleventh Circuit's ruling in Chukwura, 5 F.3d at 1423, is the law of the case, and Chukwara's appeal on the basis of the validity of the Departure Order is dismissed." Chukwura, 101 F.3d at 231.

Similarly, the Second Circuit's decisions in Transaero I and III remain the law of the case. This Court will follow its mandate on remand and will address only issues relating to the rate of interest and the proper time period over which the interest was to accrue.

The parties are ordered to appear before the Court for a hearing on April 3rd, 1997 and to submit supporting papers ten days in advance of such date, and it is

SO ORDERED.

/s/
JACOB MISHLER
United States District Judge

Appendix G

Appendix G
(Apr. 21, 1989 EDNY Decision)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

TRANSAERO, INC.,

Plaintiff

CV 88-2788

-against-

Memorandum of Decision and Order

LA FUERZA AEREA BOLIVIANA,
an Instrumentality of
THE REPUBLIC OF BOLIVIA,
a Foreign State,

Defendants.

April 21, 1989

APPEARANCES :

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DORMAN & HOCHAUSER, P.C.
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Randall S.D. Jacobs, Esq., Of Counsel

LA FUERZA AEREA BOLIVIANA
734 Avenue Montes
La Paz, Bolivia

MISHLER, District Judge

Appendix G
(Apr. 21, 1989 EDNY Decision)

Plaintiff, Transaero Inc. ("Transaero") moves pursuant to Fed. R. Civ. P. 55(b)(1) and 28 U.S.C. § 1608(e) for the entry of a default judgment against defendant La Fuerza Aerea Boliviana ("Fuerza"), an instrumentality of the Republic of Bolivia. The summons and complaint were properly served in accordance with 28 U.S.C. § 2608(b)(3) (B) on or about September, 1988, and default was noted by the Clerk of the Court on February 1, 1989. A hearing with respect to plaintiff's motion was scheduled for March 30, 1989 at which time defendant, despite adequate notice, failed to appear.

The complaint states a cause of action based on breach of contract for the failure to pay amounts due and owing for the purchase and delivery of aviation equipment. Such purchases fall within the "commercial activities" exceptions to the Foreign Sovereign Immunities Act, 28 U.S.C. § 1605(a)(2) ("FSIA"). See Letelier v. Republic of Chile, 748 F.2d 790, 797 (2d Cir. 1984) (commercial activity "is of the type an individual would customarily carry on for profit"); Arango v. Guzman Travel Advisors Corp., 621 F.2d 1371, 1379 (5th Cir. 1980) (activity is commercial if "the particular conduct giving rise to the claim in question actually constitutes or is in connection with commercial activity, regardless of the defendant's generally commercial or governmental character"). The purchase of aviation equipment constitutes such commercial activity, therefore, the FSIA does not bar entry of default judgment.

Plaintiff seeks the amount of $983,696.60, representing the unpaid balance of the account plus contractual interest to the date of the complaint. Plaintiff's motion is unopposed, and the claim is supported by the proof submitted.

SO ORDERED.

The Clerk of the Court is directed to enter judgment for the plaintiff and against the defendant in the amount of $983,696.60.

/S/
U. S. D. J.

APPENDIX H

Appendix H
(EDNY Apr. 28, 1989 Default Judgment)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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x

TRANSAERO, INC.,
Plaintiff

-against-

DEFAULT
JUDGMENT
CV 88 2788 (JM)

LA FUERZA AEREA BOLIVIANA,
an Instrumentality of
THE REPUBLIC OF BOLIVIA,
a Foreign State,
Defendants.

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A memorandum of decision and order of Hon. Jacob Mishler, United States District Judge, having been filed on April 24, 1989, granting plaintiff's motion for the entry of a default judgment against the defendant, and directing the Clerk of the Court to enter judgment in favor of the plaintiff and against the defendant in the amount of $983,696.60, it is

ORDERED and ADJUDGED that the plaintiff Transaero, Inc. shall recover of the defendant La Fuerza Aerea Boliviana, an Instrumentality of The Republic of Bolivia, a Foreign State, the sum of $983,696.60.

Dated: Uniondale,
New York
April 28, 1989

ROBERT C. HEINEMANN
Clerk of the Court

By:
JOSEPH DI TALIA
Deputy Clerk-in-Charge

APPENDIX I

Appendix I
(1992 Decision U.S.D.C. for the District of Columbia)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

TRANSAERO, INC.,

Plaintiff,

v.

Misc. Action
No. 91-0139
(GHR)

LA FUERZA AEREA BOLIVIANA,
an instrumentality of THE
REPUBLIC OF BOLIVIA,

Defendant.

ORDER

Before the Court, as a motions matter, is the summary judgment motion of defendant La Fuerza Area Boliviana ("La Fuerza") to quash interrogatories and dismiss proceedings. Defendant is the air force of the Republic of Bolivia. It is also the judgment debtor on a default judgment entered on April 28, 1989, in an action entitled Transaero, Inc. v. La Fuerza Aerea Boliviana, an Instrumentality of the Republic of Bolivia, a Foreign State, No. CV 88-2788, filed in the United States District Court for the Eastern District of New York, and subsequently registered in this district court under 28 U.S.C. § 1963. Through the motion now before the Court, La Fuerza seeks to collaterally attack the default judgment upon which the interrogatories are based, on the grounds that the district court in New York lacked personal jurisdiction under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602-1611 ("FSIA")

to enter a default judgment in the first place. The motion has been fully briefed. The dispute presents a mixed issue of law and fact which may be resolved on the record before the Court without resort to further proceedings.

The dispositive issue is whether service was proper under the terms of Section 1608 of the FSIA, which governs service of process on foreign states. See 28 U.S.C. §§ 1608(a), (b). This issue in turn depends on whether, under this provision, La Fuerza is "a foreign state or political subdivision of a foreign state" to be served in accordance with the requirements of Section 1608(a), or "an agency or instrumentality of a foreign state" to be served in accordance with the somewhat less strict requirements of Section 1608(b). La Fuerza contends that it is an integral part of the Bolivian state and thus can be served only under Section 1608(a).

Plaintiff Transaero, Inc. ("Transaero") served La Fuerza under Section 1608(b) on the theory that the Bolivian Air Force is an instrumentality of the Bolivian state.[1] There is no dispute that La Fuerza received actual notice of Transaero's lawsuit in accordance with the terms of that provision. Nevertheless, La Fuerza did not appear in the action. A default was noted and Transaero moved for a default judgment. Transaero's motion was heard before the Hon. Jacob Mishler in the United States District Court for the Eastern District of New York on March 30, 1989. Although it was notified by mail, see Def.'s Exh. F;

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[1] Transaero is a New York corporation which brought the action in the Eastern District of New York to recover an unpaid balance and accrued interest of $983,696.60 allegedly owed it from the sale of aviation equipment to La Fuerza. Jurisdiction was based on 28 U.S.C. § 1330.

Pl.'s Exh. D, La Fuerza did not appear at this hearing either. By Memorandum of Decision and Order dated April 21, 1989, Judge Mishler found that 1) the summons and complaint were properly served in accordance with Section 1608(b) of the FSIA, 2) the complaint stated a cause of action for breach of contract, 3) the suit concerned purchases undertaken by La Fuerza within the "commercial activities" exception to sovereign immunity under the Section 1605(a)(2) of the FSIA, 4) default judgment was not barred by the FSIA, and 5) Transaero's proof of claim supported judgment against La Fuerza in the amount of $983,696.60. See Def.'s Exh. D. Judge Mishler accordingly granted Transaero's motion and entered default judgment in that amount.

In ruling that La Fuerza had been properly served under the FSIA, Judge Mishler referred to defendant as "an instrumentality of the Republic of Bolivia." Id. Although this Court is not bound to defer to that conclusion, and may thus entertain La Fuerza's collateral attack on personal jurisdiction, see Practical Concepts, Inc. v. Republic of Bolivia, 811 F.2d 1543, 1547 (D.C. Cir. 1987); 18 Charles Alan Wright, et al., Federal Practice & Procedure, 4430 at 292-94 (1981 & Supp. 1992), the Court does not believe that Judge Mishler's finding -- that La Fuerza had been properly served -- was mistaken.

While the FSIA provides a three-part definition of "agency or instrumentality of a foreign state," see 28 U.S.C. § 1603(b), the crux of that definition for the purposes of this case is whether the entity in question "is a separate legal person,

corporate or otherwise." 28 U.S.C. § 1603(b)(1).[2] A review of the case law shows that, in interpreting this language, courts look to whether the entity can sue or be sued in its own name, whether the entity can enter into contracts in its own name, or whether the entity is capable of holding property in its own name under the law of the foreign state where it was created, as indicia of separateness under Subsection 1603(b)(1). See Marlowe v. Argentine Naval Comm'n, 604 F. Supp. 703, 706-7 (D.D.C. 1985); Unidyne Corp. v. Aerolineas Argentinas, 590 F. Supp. 398, 400 (E.D. Va. 1984). This analysis finds support in the legislative history of Section 1603, which provides the following additional guidance:

> As a general matter, entities which meet the definition of an "agency or instrumentality of a foreign state" could assume a variety of forms, including a state trading corporation, a mining enterprise, a transport organization such as a shipping line or airline, a steel company, a central bank, an export association, a governmental procurement agency or a department or ministry which acts and is suable in its own name.

H.R. Rep. No. 94-1487, at 15-16 (emphasis added).

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[2] Again, it is undisputed that La Fuerza is "an organ of a foreign state or political subdivision thereof," 28 U.S.C. § 1603(b)(2), and that it is "neither a citizen of a State of the United States . . . nor created under the laws of any third country." 28 U.S.C. § 1603(b)(3).

With these considerations in mind, it is apparent to this Court that La Fuerza is an "agency or instrumentality" of the Bolivian state for the purposes of applying Section 1608 of the FSIA. La Fuerza clearly has capacity to sue and be sued in its own name, as cases in other jurisdictions demonstrate. See, e.g., Shapiro v. Republic of Bolivia, 930 F.2d 1013 (2nd Cir. 1991). (The Bolivian Air Force named as a defendant in addition to the Republic of Bolivia); Office of the Comptroller General v. International Promotions and Ventures, Ltd., 618 F. Supp. 202, 203 n. 1 (S.D.N.Y. 1985) (Suit brought on behalf of the Bolivian Air Force). And La Fuerza clearly has capacity to enter into contracts in its own name, as the contract in this case and contracts in other cases demonstrate. See Decl. of General Dardo Gomez Garcia ¶ 8, Def.'s Exh. A; Def.'s Exh. D (Letter of April 14, 1987, to Anthony Caputo); Office of the Comptroller General, 618 F. Supp. at 203.

If La Fuerza is an instrumentality of the Bolivian state, it follows, under the undisputed facts of this case, that Judge Mishler was correct in determining that service was proper under 28 U.S.C. § 1608(b). And if service was proper under the FSIA, it likewise follows that Judge Mishler's court had personal jurisdiction over La Fuerza. That being the case, it is unnecessary to address the substantial compliance issue raised by Transaero. Defendant having asserted no other grounds for challenging personal jurisdiction, it is accordingly.

ORDERED, that defendant's Motion for Summary Judgment to Quash Interrogatories and to Dismiss Proceedings is

DENIED.

Appendix I

(1992 Decision U.S.D.C. for the District of Columbia)

9/25/92

DATE

GEORGE H. REVERCOMB
UNITED STATES DISTRICT JUDGE

Appendix J

Appendix J
(Aug.12, 1993 Decision EDNY)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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x

TRANSAERO, INC.,

Plaintiff — 88-CV-2788

-against- — Memorandum of Decision and Order

LA FUERZA AEREA BOLIVIANA,
an Instrumentality of
THE REPUBLIC OF BOLIVIA,
a Foreign State,

Defendant — August 12, 1993

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APPEARANCES :

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Appendix J
(Aug.12, 1993 Decision EDNY)

Andrew M. Danas, Esq., of counsel

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James W. Shannon, Esq., of counsel
Timothy S. Driscoll, Esq., of counsel

MISHLER, District Judge

Defendant, La Fuerza Aerea Boliviana ("Air Force"), moves pursuant to Fed. R. Civ. P. 60(b) to set aside the default judgment entered in the above captioned case on April 28, 1989, pursuant to this Court's Memorandum of Decision and Order dated April 24, 1989. Defendant also moves pursuant to Fed. R. Civ. P. 62(b) for a stay of execution of the default judgment pending this Court's consideration of Defendant's motion to set aside judgment. Finally, Defendant moves to dismiss Plaintiff Transaero, Inc.'s ("Transaero") complaint with prejudice and to award Air Force attorney's fees and costs incurred in defending the default judgment and making this motion. Plaintiff cross moves for Rule 11 sanctions against Defendant for bringing the instant motion.

For the reasons set forth below, Defendant's motions are denied in their entirety and Plaintiff's motion for Rule 11 sanctions is also denied.

BACKGROUND

Appendix J
(Aug.12, 1993 Decision EDNY)

This case arises out of an alleged breach of a credit agreement entered into between Transaero, a supplier of aircraft parts, and the Air Force in May 1981. The credit agreement created an open account upon which Air Force could make purchases from Transaero. The agreement required the Air Force to pay interest of 1 3/4% per month (21% per annum) on all purchases not paid within 120 days of shipment. From June 22, 1981 until April 14, 1982, the Air Force ordered and accepted delivery of certain aviation equipment and thereby accumulated a principal balance of $598,115.76. The Air Force made no payments until October 30, 1984 when it made a payment to Transaero of $381,688.29. The Air Force claims that this payment was credited against the principal balance of $598,115.76, exclusive of any accumulated interested owed, leaving a principal amount due of $216,427.47.

On or about January 6, 1986, after several weeks of negotiations between the parties, the Air Force made a second payment to Transaero of $266,427.47. The Air Force claims that under the terms of an agreement between the parties, this payment represented a final payment and a full settlement of its account with Transaero: $216,427.47 in owed principal and $50,000 in nominal interest. Transaero rejects this characterization, claiming that the payment represented only a partial settlement and that the Air Force still owed several hundred thousand dollars in unpaid interest and/or principal. Accordingly, Transaero continued to charge Air Force interest on this unpaid debt through the time this case was filed in 1988. The Air Force made no further payments to Transaero.

Appendix J
(Aug.12, 1993 Decision EDNY)

On or about September 8, 1988, Transaero, by its attorney Jacobs, filed a verified compliant seeking $983,696.60 in damages from the Air Force based upon the following theories: (1) "goods sold and delivered and accrued interest on the unpaid balance," (2) "account stated," (3) "beach of the Finance Agreement," (4) "interest accruing on the unpaid balance of $598,115.76 for 86 months." (Complaint ¶ 12-17.) In connection with the filing of the complaint, Jacobs submitted two certifications, the first dated September 8, 1988, and the second dated October 5, 1988, and an affidavit dated January 25, 1989 ("Jacobs Affidavit").

Air Force failed to serve and file an answer or enter an appearance. Subsequently, Transaero moved for a default judgment. On March 30, 1989 we held a hearing on Transaero's motion. In a Memorandum of Decision and Order dated April 21, 1989, we granted Transaero's motion for a default judgment and directed the Clerk of the Court to enter a default judgment for Transaero against Air Force in the amount of $983,696.60. In our Memorandum of Decision and Order we found the following: (1) the summons and complaint were properly served upon Air Force in accordance with 28 U.S.C. § 2608(b)(3)(B); (2) Air Force had adequate notice of the hearing scheduled for March 30, 1989, but failed to enter an appearance; (3) the complaint stated a cause of action based on breach of contract for Air Force's failure to pay amounts due and owing for the purchase and delivery of aviation equipment; (4) Air Force was not entitled to Sovereign Immunity under the Foreign Sovereign Immunities Act because its purchases of the aviation equipment constituted "commercial activities" within the "commercial activities" exception of 28 U.S.C. § 1605(a)(2)

of the FSIA; (5) Transaero's claim was supported by the proof submitted. A default judgment was entered by the Clerk of the Court on April 28, 1989.

The Air Force now moves, more than 4 years later, to have the $983,696.60 judgment set aside on the grounds that the judgment was obtained by a fraud on the court. Air Force states:

> [T]he Court based its opinion on a sworn affidavit executed by plaintiff's counsel that, in its numerous misrepresentations of fact and law, constituted a fraud upon the court. [And] Plaintiff's counsel, on two separate occasions, certified falsely to facts necessary to establish this Court's subject matter jurisdiction.

(Def. Mem. Law at 1.)

DISCUSSION

1. Rule 60(b)

Rule 60(b) reads in pertinent part as follows:

> On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud . . . misrepresentation, or other misconduct of an

> adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged . . . or (6) any other reason justifying relief form the operation of the judgment.

Fed. R. Civ. P. 60(b).

In considering a Rule 60(b) motion, we must balance the policy in favor of hearing a litigant's claims on the merits against the policy in favor of finality. Kotlicky v. United States Fidelity & Guaranty Co., 817 F.2d 6, 9 (2d Cir. 1987) (citing 11 C. Wright & A. Miller, Federal Practice and Procedure § 2857 (1973)). All Rule 60(b) motions must be made within a reasonable time and motions under Rule 60(b)(1), (2), and (3) must be made within one year after the judgment. Id. Under the saving clause of subsection (6), relief from a final judgment may also be obtained at any time by way of an independent action to set aside a judgment for "fraud on the court." See Hazel-Atlas Glass Co. v. Hartford-Empire Co., 322 U.S. 238, 246 (1944); Serzysko v. Chase Manhattan Bank, 461 F.2d 699, 702 (2d Cir.), cert. denied, 409 U.S. 883 (1972) (Rule 60(b) imposes "no time limit" for claim of fraud on the court.).

"Although both clause (3) and the saving provision of Rule 60(b) provide for relief from a judgment on the basis of fraud, the type of fraud necessary to sustain an independent action attacking the finality of judgment is narrower in scope than that which is sufficient for relief by timely motion." Gleason v. Jandrucko, 860 F.2d 556, 558 (2d Cir. 1988)(citations omitted). "`Fraud on the court' is limited to fraud which seriously affects the integrity of the normal process of adjudication." Gleason,

860 F.2d at 559 (citing Kupferman v. Consolidated Research & Mfg. Corp., 459 1072, 1078 (2d Cir. 1972)). Fraud on the court involves conduct which "threatens the very integrity of the judiciary and the proper administration of justice." Id, (citing Hazel-Atlas, 322 U.S. at 246, 64 S.Ct. at 1001). The cases where it has been found have involved the most egregious conduct involving "corruption of the judicial process itself." 11 C. Wright and A. Miller, Federal Practice and Procedure § 2870 (1973). "Generally, courts require that the evidence in support of the motion to vacate a final judgment be 'highly convincing,' that a party show good cause for the failure to act sooner and that no undue hardship be imposed on other parties." Kotlicky, 817 F. 2d at 9, (citing United States v. Cirami, 563 F. 2d 26, 32 (2d Cir. 1972).

2. Defendant's Allegations of Fraud

The Air Force claims that Transaero's attorney, Jacobs, committed a fraud on the court by submitting an affidavit and certifications containing numerous false statements and misrepresentations. Further, Air Force alleges that the court relied on these false statements in granting Transaero's motion for entry of default judgment.

Air Force makes the following allegations: (1) the Jacobs Affidavit falsely represented that Transaero's claim was for "goods sold and delivered, account stated, and breach of finance agreement," when in fact Transaero's claim was for contract interest only; (2) the Jacobs Affidavit, in calculating the interest allegedly owed, violated the terms of the Finance Agreement and New York law by charging compound interest;

(3) Jacobs failed to inform the Court that the applicable statute of limitations had expired and that, therefore, Transaero's claim was time barred; (4) Jacobs failed to disclose that Transaero's acceptance of the second payment of $266,427.47 represented a final settlement of any and all obligations of Air Force to Transaero.

a. Nature and Amount of Claim

Air Force contends that its January 1986 payment of $266,427.47 extinguished its principal debt to Transaero. As evidence, it points to statements of account wherein the payment is shown credited against principal and not against accumulated interest and to various cables and letters between the parties discussing the payment. Consequently, Air Force argues that any amounts allegedly still owing to Transaero consisted of unpaid accumulated interest. Nonetheless, in its complaint and supporting affidavit, Transaero claimed that Air Force owed principal for goods sold and delivered. This misrepresentation, Air Force claims, mislead the Court into finding diversity jurisdiction where none existed and waiving arbitration where it should have been required.

This Court has jurisdiction in diversity cases where the amount in controversy exceeds $50,000 "exclusive of interest and costs." 28 U.S.C. § 1332(a). Air Force argues that unpaid accumulated interest it allegedly owed should have been excluded from the calculation of the amount in controversy as "interest". Air Force claims that Jacobs, by falsely stating that the claim was for "goods sold and delivered", fraudulently mislead the Court into finding subject matter jurisdiction when,

in fact, the amount in controversy, exclusive of interest and costs, was less than $50,000.

Similarly, Air Force alleges that Jacobs fraudulently mislead the court into waiving mandatory arbitration. Local Arbitration Rule 3(A) makes arbitration mandatory in civil cases where the amount in controversy "exclusive of interest and costs" is less than $100,000.00. Jacobs' aim in avoiding arbitration, according to Air Force, was to avoid a forum where the true nature of Transaero's claim would come to light.

As an initial matter, we note that all of the documentary evidence relied on by Air Force in making its allegation of fraud were submitted by Jacobs in connection with Transaero's motion for a default judgment. The various letters, cables and statements of account were part of the record and available for our review. The record reveals a contract for goods, a finance agreement, and statements of account from Transaero requesting payment of accrued interest from Air Force. The complaint and Jacobs affidavit offer one plausible interpretation of these documents. Air Force suggests that by not offering a different interpretation, one favorable to its case, Jacobs committed a fraud upon the court. Air Force's accusations are without merit.

Air Force's interpretation of 28 U.S.C. § 1332(a) is in error. Where interest owed is part of an underlying contractual obligation, unpaid interest can be said to become part of the principal demand in a suit based on the contract. See Brown v. Webster, 156 U.S. 328, 330, 15 S. Ct. 377 (1895); Edwards v. Bates County, 163 U.S. 169, 16 S. Ct. 967 (1895) ("[W]hen the

interest evidenced by a coupon has become due and payable, the demand based upon the promise contained in such coupon is no longer a mere incident of the principal indebtedness represented by the bond, but becomes really a principal obligation."). We find that Jacobs had a legal basis upon which he represented that the claim was for "goods sold and delivered, account stated, and breach of finance agreement" and that the principal amount in controversy exceeded $50,000. The interest claimed by Transaero constituted a principal claim and was not excludable "interest" within the meaning of the 28 U.S.C. § 1332(a). Therefore, we properly exercised subject matter jurisdiction in this case. Moreover, the local rules did not mandate arbitration and, therefore, the case was ripe for adjudication.

We find no convincing evidence that Jacobs perpetrated a fraud on the court in the manner described above. Air Force offers nothing more than an alternative interpretation of the documentary evidence from that offered by Jacobs and ultimately accepted by this Court. The arguments it offers are simply those it could have brought forward at the 1989 hearing, but chose not to.

b. Compound Interest

Air Force alleges that the $983,696.60 claimed by Transaero in its complaint and ultimately awarded in the default judgment was calculated according to terms that violated the finance agreement and which constitute illegal compound and usurious interest. In support of its position, Air Force offers the same documentary record discussed above,

which was available to the court for review. In addition, it offers the calculations of its accounting firm which it says show that "had the Jacobs Affidavit abided by the express terms of the contract and settled New York law, the actual amount owed in the default judgment would have been $234,835.93." (Def. Mem. of Law at 27.) This claim contradicts Air Force's earlier claim that Transaero's claim failed to meet the minimum amount in controversy requirement of 28 U.S.C. § 1332(a) and its claim that the 1986 payment represented a full settlement.

Specifically, Air Force claims that Jacob's interest calculations violated the terms of the finance agreement in several ways: (1) charging interest before Air Force's payment for equipment was due; (2) charging interest after Air Force had tendered full payment on the principal debt; (3) charging a rate of interest greater than the contractual 21% per annum; and (4) charging interest on amounts above those subject to the contract rate of interest. Also, the Jacobs affidavit allegedly charged illegal compound interest, See Newburger-Morris Co. v. Talcott, 219 N.Y. 505 (1916), and criminal usurious interest. See N.Y. Penal Law §190.40 (McKinney 1989).

Air Force brings forth no evidence of bad faith or dishonesty by Jacobs beyond the alleged miscalculations. Air Force does not allege that Jacobs altered or withheld any relevant documents from the record. Air Force strains our credulity when it asks us to believe that Jacobs intentionally miscalculated the amount of the claim but nevertheless submitted documents which upon inspection would reveal the

error, expecting that neither the Court nor the Air Force would discover his duplicity.

Transaero argues that the finance agreement, statements of account, and communications between the parties can be read to support Jacobs' interest calculations. For example, Transaero claims that Air Force accepted Transaero's interpretation of the debt owed by failing to object to statements of account containing the interest charges. See In Re Magnus Harmonica Corporation, 262 F. 2d 525 (3rd Cir. 1959). Also, Transaero states that, from a letter preceding the 1986 payment, it can be argued that Air Force understood that Transaero would continue to charge it interest on the unpaid balance. Finally, Transaero notes that under New York law, courts will enforce a promise to pay compound interest, if made after simple interest has accrued, provided that there is some other consideration to make the promise good. See Newburger-Morris Company v. Talcott, 114 N.E. 846 (N.Y. Ct. App. 1916).

Considering Transaero's arguments, we conclude that there was no fraud on the court. We find that Jacobs had a legal and factual basis upon which he could in good faith represent to the court that Air Force was indebted to Transaero in the amount of $983,696.60. Whether his affidavit correctly recounts the law and facts is not the issue. The time has passed when this Court will consider the merit's of Transaero's claim. The only issue before us is whether the default judgment was obtained by fraud. We find that Air Force has failed to bring forth convincing evidence that Jacobs' calculation of interest payments constituted a fraud on the court.

c. Statute of Limitations

Air Force argues that in July 1988, when Transaero filed its complaint, Transaero's claims were barred by the four year statute of limitation governing the sale of goods under New York's version of the Uniform Commercial Code. Air Force claims that Jacobs committed fraud on the court by failing to disclose this fact to the Court. This is, at most, an argument to set aside judgment on the ground of mistake of law pursuant to 60b(1). Of course, at this time, any claim of mistake is barred: the one year limitation having expired. Thus, Air Force may be understood to be making the insupportable argument that where an attorney fails to raise a legal argument helpful to the opposing party's case, he has committed a fraud on the court.

Air Force presents no evidence that Jacobs misled this court with regard to the applicable statute of limitations. Moreover, Transaero notes that actions for an account stated are governed by a six year statute of limitations. See N.Y. Civ. Prac. L. & R. § 213(2) (McKinney 1989). Since the statute begins to run on the day of the statement, it can be fairly argued that Transaero's claim under that theory was not time barred. Similarly, it can be argued that Air Force acknowledged its debt in a March 17, 1987 letter (Plaintiff's Exh. 10) and that a new limitations period arose at that time. See NY Gen. Oblig. Law §17-101 (McKinneys 1989).

d. Settlement

Air Force argues that the documentary evidence clearly establishes that its 1986 payment to Transaero fully and

completely settled any outstanding debt it might have owed. Air Force accuses Jacobs of fraud for failing to disclose this fact to the court. Again, Air Force has failed to offer any convincing proof of fraud. The documents that Air Force claims clearly indicate a final settlement were submitted by Jacobs and available to the Court for review. While we do not now pass on whether a final settlement was entered into, the evidence is sufficient to support a reasonable argument that the 1986 payment represented only a partial settlement of the dispute. Therefore, Jacobs did not misrepresent the record, he simply offered a version of the record in presenting his client's case. No fraud was committed.

CONCLUSION

For the reasons set forth above, Defendant, La Fuerza Aerea Boliviana's, motions to set aside the judgment, to stay execution of the judgment, to dismiss the complaint and to grant fees and costs are denied in their entirety. Plaintiff, Transaero, Inc.'s, motion to impose Rule 11 sanctions on Defendant is also denied.

And it is

SO ORDERED.

Jacob A. Mishler
U. S. D. J.

Appendix K

Appendix K
(*Transaero I*)

24 F.3d 457
29 Fed.R.Serv.3d 251
(Cite as: 24 F.3d 457)

TRANSAERO, INC., Plaintiff-Appellee,
v.
LA FUERZA AREA BOLIVIANA, an instrumentality of the Republic of Bolivia, a Foreign State, Defendant-Appellant.

No. 1063, Docket 93-7903.

United States Court of Appeals,
Second Circuit.

Argued Feb. 22, 1994.

Decided May 19, 1994.

Bolivian Air Force moved for relief from default judgment entered against it in action brought by aircraft parts supplier on an account. The United States District Court for the Eastern District of New York, Jacob Mishler, J., denied relief. Air Force appealed. The Court of Appeals, Lasker, District Judge, sitting by designation, held that: (1) there was no fraud on the court which entitled Air Force to relief from judgment; (2) judgment was not void; and (3) Air Force was not entitled to relief from judgment under rule providing relief for any other reason justifying relief from operation of judgment.

Affirmed.

Ronald N. Cobert, Washington, DC (Grove, Jaskiewicz and Cobert, Andrew M. Danas, of counsel), for plaintiff-appellee.

Gregory B. Craig, Washington, DC (Williams & Connolly, James W. Shannon, Jr., of counsel), for defendant-appellant.

Before: NEWMAN and VAN GRAAFEILAND, Circuit Judges, and LASKER, District Judge. [FN*]

FN* Hon. Morris E. Lasker, Judge, United States District Court for the Southern District of New York, sitting by designation.

LASKER, District Judge:

The Air Force of the Republic of Bolivia ("BAF") appeals from a decision of the United States District Court for the Eastern District of New York, Jacob Mishler, Judge, which denied its motion for relief under Rule 60(b) of the Federal Rules of Civil Procedure from a default judgment entered against it on April 28, 1989.

The appeal from the order denying Rule 60(b) relief brings up for review only the denial of the motion and not the merits of the underlying default judgment. Branum v. Clark, 927 F.2d 698, 704 (2d Cir.1991). The standard for review is abuse of discretion. Id. For the reasons discussed below, we conclude that there was no abuse, but we remand for the limited purpose

of assessing the mathematical accuracy of the default award to Transaero, Inc.

BACKGROUND

The action arises out of the alleged breach of a credit agreement between Transaero, a supplier of aircraft parts, and the Bolivian Air Force entered in May 1981. For a number of years before May 1981, Transaero had been selling aircraft parts to BAF, but had been experiencing delays in payment on outstanding invoices averaging six to twelve months. As a result, the present agreement was drafted to require BAF to pay 1.75% monthly interest (21% per year) on all purchases not paid within 120 days of shipment. By April 14, 1982, the Bolivian Air Force had accumulated an outstanding principal balance of $598,115.76.

On September 8, 1988, despite intervening payments by the Bolivian Air Force totalling $648,115.76, Transaero filed suit to collect $983,696.60 for outstanding principal and interest. The Bolivian Air Force failed to answer the complaint or to enter an appearance at a hearing scheduled by Judge Mishler for March 30, 1989 which resulted in an inquest on damages.[1] On April 28, 1989, the Clerk of the Court entered a default

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[1]It is BAF's position that it defaulted because it lacked proper notice of Transaero's complaint and of the hearing. Judge Mishler found to the contrary in his Opinion of April 21, 1989 directing entry of the default judgment and so did the late Judge Revercomb in a separate proceeding in the District Court of the District of Columbia. BAF's appeal of Judge Revercomb's Order of September 25, 1992 is now pending in the Circuit Court for the District of Columbia.

judgment for Transaero in the amount requested. On May 12, 1993, over four years later, BAF moved to set aside the default judgment under Rule 60(b). On August 12, 1993, Judge Mishler denied the motion.

DISCUSSION

BAF's primary argument on appeal is based on the so-called saving clause of Rule 60(b) which provides that "[t]his rule does not limit the power of a court ... to set aside a judgment for fraud upon the court." BAF argues that there has been a fraud on the court in this case because Transaero's counsel allegedly submitted a fraudulent affidavit in support of the 1989 motion for entry of the default judgment and the district court relied on the false statements made there in granting the motion.

BAF also argues that the default judgment should be set aside under clause (4) of Rule 60(b) which provides that, within a reasonable time from the time of judgment, "[o]n motion and upon such terms as are just, the court may relieve a party ... from a judgment [where] the judgment is void." Fed.R.Civ.P. 60(b)(4). The basis for this claim is BAF's contention that the district court lacked subject matter jurisdiction to enter the default judgment because Transaero's claim was not first submitted to compulsory arbitration, which, BAF maintains, was required in this case by the Local Rules of the Eastern District of New York.

Finally, BAF argues that the default judgment should be set aside under the catch-all clause of Rule 60(b) which provides

for relief for "any other reason justifying relief from the operation of the judgment." Fed.R.Civ.P. 60(b)(6). BAF claims that Rule 60(b)(6) relief is warranted because of the district court's alleged failure to comply with section 1608(e) of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602-11 (1994), which prohibits default judgments against foreign states unless the claimant establishes the right to relief by evidence satisfactory to the court and requires a copy of any default judgment to be sent to the foreign state. BAF also points out the disfavor with which courts view default judgments, especially those against foreign sovereigns. First Fidelity Bank, N.A. v. Government of Antigua & Barbuda-Permanent Mission, 877 F.2d 189, 196 (2d Cir.1989).

The Claim of Fraud on the Court.

BAF points to a string of representations made by Transaero's counsel in his affidavit in support of the 1989 motion for entry of the default judgment which, BAF maintains, were fraudulent. BAF charges that the affidavit falsely labeled Transaero's claim as one for principal and interest, when it was really for interest only; sought compound interest in violation of New York law; claimed interest for a longer period, at a higher rate and on a greater amount than authorized by the credit agreement and New York law; and sought judgment on a breach of contract claim, even though it was time-barred.

Fraud on the court is "fraud which seriously affects the integrity of the normal process of adjudication." Gleason v. Jandrucko, 860 F.2d 556, 559 (2d Cir.1988). It involves "far

more than an injury to an individual litigant" or "a case of a judgment obtained [simply] with the aid of a witness who, on the basis of after-discovered evidence, is believed possibly to have been guilty of perjury." Id. (citations omitted) (alteration in original). The concept embraces "that species of fraud which does or attempts to, defile the court itself, or is a fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases presented for adjudication." Kupferman v. Consolidated Research & Mfg. Corp., 459 F.2d 1072, 1078 (2d Cir.1972) (quoting 7 Moore's Federal Practice ¶ 60.33, at 515 (1971 ed.)).

The representations by plaintiff's counsel specified above did not constitute a fraud on the court. For example, Transaero had a good faith basis for believing that BAF had acknowledged Transaero's entitlement to compound interest because BAF failed to make timely objections to Transaero's invoices and had made partial payments on its debt in 1984 and 1986. Similarly, Transaero had a good faith basis for believing that its breach of contract claim was not time-barred when it filed suit in September 1988, since the limitations period was not obviously triggered until BAF repudiated the payments Transaero claimed under the credit agreement in April 1987--well within the four year limitations period governing the sale of goods under the U.C.C. Finally, as discussed below in the section on BAF's claim under Rule 60(b)(4), there is no merit to BAF's claim that, because Transaero's claim was for interest only, the district court lacked jurisdiction to enter the default judgment.

Moreover, BAF has presented no evidence of bad faith or dishonesty by Transaero's counsel. Indeed, as the district court points out in its opinion below, all the documentary evidence on which BAF now bases its claim of fraud on the court was submitted to the district court itself by Transaero's counsel in connection with the very motion for entry of the default judgment. The up- front submission of this documentary evidence fundamentally undermines BAF's claim of fraud on the court. BAF's response to this point--that a busy district judge cannot be expected to sort through a disorganized record--is unpersuasive.

The Rule 60(b)(4) Claim.

The Local Rules of the Eastern District of New York, where the default judgment was entered, require the Clerk of the Court to "designate and process for compulsory arbitration all civil cases ... wherein money damages only are being sought in an amount not in excess of $100,000.00 exclusive of interest and costs." N.Y. Rules of Court, App. C § 3(A), at 797 (McKinney 1994). BAF argues that, since Transaero's claim is one for interest only, the claim ought to have been submitted to arbitration pursuant to the local rule. BAF maintains that, because the case was not arbitrated as allegedly required, the case was not ripe for review and the district court lacked subject matter jurisdiction to decide it. Hence, according to BAF, the judgment is void and should be set aside under Rule 60(b)(4) of the Federal Rules of Civil Procedure.

Invoices submitted by Transaero to the Bolivian Air Force show that Transaero applied the Air Force's last payment to the

outstanding principal debt and that, apparently, from that time on, BAF owed interest only. In Edwards v. Bates County, 163 U.S. 269, 16 S.Ct. 967, 41 L.Ed. 155 (1896), the Supreme Court held that, for purposes of calculating the adequacy of the amount in controversy for diversity jurisdiction under a predecessor statute to 28 U.S.C. § 1332(a), the circuit court should have included the value of the matured interest coupons attached to the bonds issued by the defendant. The Supreme Court stated that "when the interest evidenced by a coupon has become due and payable the demand based upon the promise contained in such coupon is no longer a mere incident of the principal indebtedness represented by the bond, but becomes really a principal obligation." Id. at 272, 16 S.Ct. at 969.

It seems clear under Edwards that where, as here, interest is owed as part of an underlying contractual obligation, unpaid interest becomes part of the principal for jurisdictional purposes. We see no reason to treat such interest differently for purposes of determining the scope of compulsory arbitration under the Local Rules of the Eastern District of New York and conclude that arbitration was not required in this case.

The Rule 60(b)(6) Claim.

Clause (6) provides "a grand reservoir of equitable power to do justice in a particular case when relief is not warranted by the preceding clauses." 7 Moore's Federal Practice ¶ 60.27[2], at 295 (2d ed. 1993). In a proper case, it is to be "liberally applied." Id. at 273. Nevertheless, relief under Rule 60(b)(6) is available only in "extraordinary circumstances." Ackermann

v. United States, 340 U.S. 193, 199, 71 S.Ct. 209, 212, 95 L.Ed. 207 (1950).

BAF argues that such circumstances exist in this case because of the district court's alleged failure to comply with the requirements of Section 1608(e) of the Foreign Sovereign Immunities Act which provides that:

> No judgment by default shall be entered by a court of the United States or of a State against a foreign state ... or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or riactory to the court. A copy of any such default judgment shall be sent to the foreign state or political subdivision in the manner prescribed for service in this section.

28 U.S.C. § 1608(e). BAF contends first that Transaero failed to "establish [its] claim or right to relief by evidence satisfactory to the court" and second that, despite the notice requirement of section 1608(e), it was not informed of the default judgment until almost three years after the judgment was entered.

The purpose of the evidentiary requirement of section 1608(e) is to assure that foreign sovereigns, who sometimes are slow to respond to legal action, are protected from unfounded claims. See Marziliano v. Heckler, 728 F.2d 151, 157-58 (2d Cir.1984) (attributing this rationale to the identical requirement for judgments against the United States under Fed.R.Civ.P.

55(e)). However, no such concerns exist in this case because Judge Mishler held an inquest on the question of damages, and his Order of April 21, 1989, directing entry of the default judgment, determined specifically that the complaint "state[d] a cause of action, based on breach of contract," the claim "f[ell] within the 'commercial activities' exception to the Foreign Sovereign Immunities Act" and was "supported by the proof submitted."

Nor, in the circumstances of this case, does the fact that BAF did not learn of the entry of the default judgment for several years constitute "extraordinary circumstances" justifying Rule 60(b)(6) relief. "Lack of notice [of a judgment] does not ipso facto mean that a judgment can or should be reopened" and "granting of such motions should be considered only where lack of notice has operated to prejudice a substantial right or remedy that would otherwise be available." Radack v. Norwegian Am. Line Agency, Inc., 318 F.2d 538, 542-43 (2d Cir.1963).

In the case at hand, the delay of notice of the default judgment did not "operate[ ] to prejudice a substantial right or remedy." It is true that, as a result of the passage of time since entry of the default judgment, BAF cannot now seek relief under subsections (1), (2) and (3) of Rule 60(b) because these provisions cannot be invoked more than one year after entry of judgment. However, it is not true that, but for the notice delay, BAF could have asserted a timely claim under any one of these subsections.

The Affidavit of General Dardo Gomez Garcia states that "[p]rior to February 28, 1992, the Bolivian Air Force was not aware that ... a Default Judgment had been entered" against BAF and the implication is plain that, from that date forward, BAF was aware of the default judgment. However, BAF did not make its Rule 60(b) motion until over one year later in May 1993. Accordingly, even if BAF had received prompt notice of the default judgment, BAF's potential claims under subsections (1), (2) or (3) would still have been time barred because BAF sat on its hands for over a year.

Finally, relying on First Fidelity Bank, N.A. v. Government of Antigua & Barbuda-Permanent Mission, 877 F.2d 189, 196 (2d Cir.1989), BAF argues that the default judgment should be set aside under Rule 60(b)(6) because "default judgments are disfavored, especially those against foreign sovereigns." Id. at 196. It is true that the First Fidelity Bank court stated that "[c]ourts go to great lengths ... to permit [default] judgments against foreign sovereigns to be set aside." Id. But First Fidelity Bank was a distinctly different case than the one at hand. The issue in First Fidelity Bank was the extent to which the foreign sovereign defendant was bound by the actions of its ambassador to the United Nations and whether the district court had jurisdiction in the circumstances. This was a case which had "serious implications for the relationships between the United States and all foreign states that send duly accredited ambassadors to head their diplomatic missions in this country." Id. at 196-97 (Newman, J., dissenting). The case before us is fundamentally an ordinary contract dispute which has no such profound implications.

* * *

Although we conclude that the district court properly denied BAF's Rule 60(b) application, there remain two questions raised by BAF as to the accuracy of the interest calculation on which the award to Transaero was based, neither of which has been specifically answered by Transaero. First, BAF contends in its brief on appeal that interest cannot have accrued against it for 86 months--as Transaero claimed in the complaint--because a period of 86 months allegedly would have commenced before BAF made its first purchase from Transaero on June 22, 1981. Second, BAF presents evidence on this motion that Transaero's interest calculations were incorrect and ranged from 20.99% per year to 26.34% per year. (Barker Aff. ¶ 18). We remand for the limited purpose of assessing the factual accuracy of the two claims described above and, if necessary, recalculating the award to Transaero accordingly.

CONCLUSION

The district court did not abuse its discretion in denying BAF's application to set aside the default judgment under Rule 60(b) of the Federal Rules of Civil Procedure. We remand for the limited purpose of re-examining the mathematical accuracy of the award to Transaero. Transaero's application for damages, including attorneys' fees and costs on appeal, is denied.

Appendix L

Appendix L

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May 23, 1994

Hand Delivered
Mr. Ron Garvin, Clerk
United States Court of Appeals
for the District of Columbia Circuit
United States Courthouse
333 Constitution Avenue, N.W.
Washington, D.C. 20001-2866

Re: Transaero, Inc., Appellee, v. La Fuerza Aerea Boliviana, Appellant; Docket No. 92-7222

Dear Mr. Garvin:

Pursuant to Federal Rule of Appellate Procedure 28(j), Appellee, Transaero, Inc., requests that the May 19, 1994 decision of the United States Court of Appeals for the Second Circuit in *Transaero, Inc., v. La Fuerza Aerea Boliviana*, No. 93-7903 (2d Cir. May 19, 1994) be brought to the attention of the Court. A copy of the decision is attached hereto. It affirms the April 28, 1989 judgment against Appellant, the validity of

which Appellant is also challenging in this Court. With regard to the matters now on appeal before this Court, Transaero notes that at footnote one (1) of the decision, the Second Circuit specifically rejects La Fuerza's arguments that it lacked proper notice of Transaero's complaint and of the hearing. The Second Circuit notes that both Judge Mishler and Judge Revercomb, in separate proceedings, found that La Fuerza did have proper notice. While the Second Circuit notes the pendency of Appellant's appeal of Judge Revercomb's decision to this Court, its decision of May 19, 1994 affirms Judge Mishler's determination and the judgment. Appellee submits that the Second Circuit's decision is dispositive of the matters now on appeal before this Court.

Appellee Transaero, Inc., is prepared to provide further briefing as to the appropriate disposition of this appeal should the Court so desire.

Sincerely,

Ronald N. Cobert

Enclosures

cc: All parties of record

Appendix M

Appendix M

(*Transaero II*)

30 F.3d 148

(Cite as: 30 F.3d 148, 308 U.S.App.D.C. 86)

TRANSAERO, INC., Appellee,

v.

LA FUERZA AEREA BOLIVIANA, Appellant.

No. 92-7222.

United States Court of Appeals,
District of Columbia Circuit.

Argued Feb. 24, 1994.

Decided July 29, 1994.

Seller of aviation parts obtained default judgment against the Bolivian Air Force in the Eastern District of New York and registered judgment in the federal district court for the District of Columbia. The Bolivian Air Force moved to dismiss, claiming that district court in New York lacked personal jurisdiction because of lack of proper service under Foreign Sovereign Immunities Act (FSIA). The United States District Court for the District of Columbia, George H. Revercomb, J., held that method of service was proper, and Bolivian Air Force took interlocutory appeal. The Court of Appeals, Sentelle, Circuit Judge, held that Bolivian Air Force was "foreign state" within meaning of FSIA, and, thus, strict compliance with requirements for service was required.

Appendix M
(*Transaero II*)

Reversed and remanded with directions.

Mikva, Chief Judge, dissented with opinion.

Appeal from the United States District Court for the District of Columbia (91ms00139).

James W. Shannon, Jr., Washington, DC, argued the cause for appellant. With him on the briefs was Gregory B. Craig, Washington, DC.

Ronald N. Cobert, Washington, DC, argued the cause for appellee. With him on the brief was Andrew M. Danas, Washington, DC. Joseph M. Roberts, Washington, DC, entered an appearance.

On the brief for amicus were Frank W. Hunger, Asst. Atty. Gen., Eric H. Holder, Jr., U.S. Atty., Douglas Letter, U.S. Dept. of Justice, and Linda Jacobson, U.S. Dept. of State, Washington, DC.

Before MIKVA, Chief Judge, and WILLIAMS and SENTELLE, Circuit Judges.

Opinion for the Court filed by Circuit Judge SENTELLE.

Dissenting opinion filed by Chief Judge MIKVA.

SENTELLE, Circuit Judge:

Appendix M
(*Transaero II*)

Transaero, Inc., a New York corporation, obtained a default judgment against La Fuerza Aerea Boliviana ("the Bolivian Air Force") in the Eastern District of New York and registered the judgment in the district court for the District of Columbia. The Bolivian Air Force moved for summary judgment, claiming that the district court in New York lacked personal jurisdiction because the default judgment had been obtained without the service of process required by the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602-1611 (1988) ("the Act"). The Bolivian Air Force contended that because it is a "foreign state or political subdivision of a foreign state" within the meaning of section 1608 of the Act, Transaero had served it improperly. The district court held instead that the Bolivian Air Force is an "agency or instrumentality" of Bolivia under the service provisions of section 1608, so that Transaero's method of service gave the New York court jurisdiction. The Bolivian Air Force has taken an interlocutory appeal from the order. See Foremost-McKesson, Inc. v. Islamic Republic of Iran, 905 F.2d 438, 443 (D.C.Cir.1990) (denial of a claim of sovereign immunity is an immediately appealable collateral order).

We hold that the Bolivian Air Force is a "foreign state or political subdivision" within the meaning of section 1608 and that Transaero's method of service was defective. We therefore reverse and remand with directions to dismiss.

I.

Transaero sold aviation parts to the Bolivian Air Force throughout the early 1980s. In 1988, Transaero filed a complaint in the Eastern District of New York that alleged breach of contract and sought $983,696.60 in damages. On

Appendix M
(*Transaero II*)

September 15, 1988, the Clerk of Court dispatched translations of the summons and complaint to the Bolivian Air Force in La Paz, Bolivia by registered mail with a return receipt requested. The Bolivian Air Force received the summons and complaint and sent a return receipt to the Clerk on September 23, 1988. The Bolivian Air Force made no appearance, and Judge Mishler scheduled a hearing on Transaero's motion for default judgment for March 30, 1989. Transaero sent notice of the hearing to the Bolivian Air Force, to the Bolivian First Minister in La Paz, Bolivia, and to the Bolivian Ambassador and Consul General in Washington. When the Bolivian Air Force failed to appear at the hearing, Judge Mishler granted the motion for default judgment. The court found that service had been properly effected under section 1608(b), but made no findings on the adequacy of service under 1608(a). The court also held that it had subject matter jurisdiction over the contract claim under section 1605(a)(2) of the Act, which creates an exception to the general rule of sovereign immunity for claims arising from "commercial activities" conducted by foreign states.

In 1991, Transaero registered the default judgment in the district court for the District of Columbia under 28 U.S.C. § 1963 (Supp. IV 1992) and served a set of interrogatories under Federal Rule of Civil Procedure 69. The Bolivian Air Force entered an appearance and moved to quash the interrogatories and dismiss the proceedings, arguing that the District Court for the Eastern District of New York lacked jurisdiction because the Bolivian Air Force had not been served in compliance with section 1608(a) of the Act. In an order dated September 25, 1992, the District Court for the District of Columbia denied the motion. The court found that Transaero had originally served

the Bolivian Air Force under section 1608(b); that the Bolivian Air Force received actual notice of Transaero's lawsuit; and that the Bolivian Air Force was notified by mail of the hearing on Transaero's motion for default judgment. The court then ruled that, as a matter of law, the Bolivian Air Force is an "agency or instrumentality" of Bolivia and that service under section 1608(b) was proper.

After the Bolivian Air Force's motion for summary judgment was denied, Transaero requested an order compelling the Bolivian Air Force to answer its interrogatories. The judge in charge of the case passed away and that motion apparently has never been resolved. On May 12, 1993, the Bolivian Air Force requested the Eastern District of New York to set aside the default judgment on the ground that it had been procured through fraudulent representations of fact. The court denied the motion, the Bolivian Air Force appealed the denial to the Second Circuit, and the Second Circuit affirmed. See Transaero, Inc. v. La Fuerza Aerea Boliviana, 24 F.3d 457 (2d Cir.1994).[1]

---

[1] The Second Circuit noted that the district courts in New York and the District of Columbia had held that the Air Force was properly served, but also noted the pending appeal that we decide today. See id. at n. 1. We do not consider whether the Eastern District's ruling might bar the Air Force's attack on personal jurisdiction, for Transaero did not assert any form of preclusion in the District Court for the District of Columbia, and we have generally refused to raise the question sua sponte. See Nixon v. United States, 978 F.2d 1269, 1274 n. 16 (D.C.Cir.1992); Taxation with Representation v. Regan, 676 F.2d 715, 717 n. 1 (D.C.Cir.1982), rev'd on other grounds, 461 U.S. 540, 103 S.Ct. 1997, 76L.Ed.2d 129 (1983).

Appendix M

(*Transaero II*)

II.

A.

Under the Act, "subject matter jurisdiction plus service of process equals personal jurisdiction." Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 308 (2d Cir.1981), cert. denied, 454 U.S. 1148, 102 S.Ct. 1012, 71 L.Ed.2d 301 (1982). The Bolivian Air Force admits that the New York court had subject matter jurisdiction under the "commercial activities" provision of section 1605(a)(2). It claims only that Transaero's service failed to comply with sections 1603 and 1608 of the Act. Section 1603 provides:

> (a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).
>
> (b) An "agency or instrumentality of a foreign state" means any entity--
>
> > (1) which is a separate legal person, corporate or otherwise, and
> >
> > (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
> >
> > (3) which is neither a citizen of a State of the United States ..., nor created under the laws of any third country.

28 U.S.C. § 1603 (emphasis added). Section 1608 does not further define either term. Section 1608(a) establishes certain requirements for service on "a foreign state or political subdivision of a foreign state," while section 1608(b) establishes different requirements for service on "agencies or instrumentalities" of foreign states.

B.

The nub of the dispute is whether the Bolivian Air Force counts as a "foreign state" or rather as an "agency or instrumentality" under section 1608. That in turn depends upon whether the Bolivian Air Force is a "separate legal person, corporate or otherwise" under section 1603(b)(1). [2] The words in themselves are opaque. Some district courts have sought to illuminate them by balancing three "characteristics" of separate legal status: whether, under the law of the foreign state where it was created, the entity can sue and be sued in its own name, contract in its own name, or hold property in its own name. Bowers v. Transportes Navieros Ecuadorianos, 719 F.Supp. 166, 170 (S.D.N.Y.1989); see also Unidyne Corp. v. Aerolineas Argentinas, 590 F.Supp. 398, 400 (E.D.Va.1984). But other courts have thought the distinction is instead a categorical one, and depends on whether the defendant is the type of entity "that is an integral part of a foreign state's political structure, [or rather] an entity whose structure and function is predominantly commercial." Segni v. Commercial

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[2] Both parties agree that the Air Force falls within the other components of the definition in §§ 1603(b)(2) and (b)(3).

Office of Spain, 650 F.Supp. 1040, 1041- 42 (N.D.Ill.1988). The amicus curiae brief of the United States in this case proposes a similar test that looks to the "core function" of the foreign governmental body at issue. See Br. of United States at 12-13, 16.

We think that the categorical approach adopted in Segni and urged, in a somewhat different form, by the United States--whether the core functions of the foreign entity are predominantly governmental or commercial-- best captures the statutory meaning. Congress spoke against a rich background of federal and international law that colors the statutory terms and fills them out. The Supreme Court has held that the Act largely codifies the "restrictive" theory of sovereign immunity, under which "immunity is confined to suits involving the foreign sovereign's public acts, and does not extend to cases arising out of a foreign state's strictly commercial acts." Verlinden B.V. v. Central Bank of Nigeria, 461 U.S. 480, 487, 103 S.Ct. 1962, 1968, 76 L.Ed.2d 81 (1983). See also Republic of Argentina v. Weltover, Inc., 504 U.S. 607, ----, 112 S.Ct. 2160, 2165, 119 L.Ed.2d 394 (1992). Thus the Act repealed foreign immunity for "commercial activities," § 1605(a)(2), but preserved it for inherently sovereign or public acts. See Saudi Arabia v. Nelson, 507 U.S. 349, ----, 113 S.Ct. 1471, 1479, 123 L.Ed.2d 47 (1993); Weltover, 504 U.S. at ----, 112 S.Ct. at 2166. The distinction between foreign states and their instrumentalities establishes two categories of actors that correspond to the restrictive theory's two categories of acts.

Besides section 1608, the distinction appears in the venue provisions of 28 U.S.C. § 1391 (1988). Section 1391(f) makes

the federal district court for the District of Columbia the venue for civil actions against foreign states and their subdivisions; but it allows venue in suits against an agency or instrumentality of a foreign state "in any judicial district in which the agency or instrumentality is licensed to do business or is doing business," § 1391(f)(3), a provision of doubtful coherence if extended beyond the category of commercial enterprises. Moreover the phrase "agency or instrumentality," or some close variant, is commonplace in the enabling charters of government corporations, both in the United States and abroad. The statute that created the Panama Railroad Company labeled it an "agency and instrumentality of the United States." See Panama Railroad Company Act, ch. 706, 62 Stat. 1076 (1948), at § 245. See also United States ex rel. Skinner & Eddy Corp. v. McCarl, 275 U.S. 1, 5, 6, 8, 48 S.Ct. 12, 13, 14, 14- 15, 72 L.Ed. 131 (1927) (referring to the United States Shipping Board Emergency Fleet Corporation as "an instrumentality of the Government," an "incorporated agenc[y]," and a "[g]overnment-owned private corporation[ ]").

The courts that have construed "agency or instrumentality" to reference the defendant's powers under foreign law have relied principally on the House Report on the Act, which said:

> [The] criterion, that the entity be a separate legal person, is intended to include a corporation, association, foundation, or any other entity which, under the law of the foreign state where it was created, can sue or be sued in its own name, contract in its own name or hold property in its own name.... As a general

> matter, entities which meet the definition of an "agency or instrumentality of a foreign state" could assume a variety of forms, including a state trading corporation, a mining enterprise, a transport organization such as a shipping line or airline, a steel company, a central bank, an export association, a governmental procurement agency or a department or ministry which acts and is suable in its own name.

H.R.REP. NO. 1487, 94th Cong., 2d Sess. 15-16 (1976), reprinted in 1976 U.S.C.C.A.N. 6604, 6614.

Without debating the legitimacy of reliance upon legislative history in other circumstances, we note that this Report is at odds with itself. All the specific examples recited fall into the category of public commercial enterprises; but the Report also states a general test that might bar those very examples and might also sweep well beyond them. The United States points out that any nation may well find it convenient (as does ours) to give powers of contract and litigation to entities that on any reasonable view must count as part of the state itself. See Br. of United States, at 7-8 (noting that under the House Report test the Departments of State and of Defense would count as "instrumentalities" of the United States). We adopt today an analysis designed to winnow the applications Congress desired from the ones it meant to exclude.

A final reason to favor the categorical approach is ease of administration in the district courts. Service of process should be the prologue to the suit rather than the central drama. When

the adequacy of service is made to turn on a complex inquiry carried out long after the litigation has begun, and in which the court must apply foreign law to foreign facts, the service provisions may derail cases rather than ensuring their prompt and orderly commencement. The case before us paints the dangers of section 1608 in somber tones. Today we must face the possibility that an attempt at service made six years ago was defective--a result we seek to forestall in future cases by tying service to the obvious functions, rather than the uncertain powers, of the foreign defendant. The district courts have perforce acquired expertise in delineating the categories of "governmental" and "commercial" under the immunity provisions of the Act, and if section 1608 is construed to turn on a similar distinction that expertise will benefit all concerned.

C.

The question, then, is whether the core functions of the armed forces of a foreign sovereign are governmental or commercial. We hold that armed forces are as a rule so closely bound up with the structure of the state that they must in all cases be considered as the "foreign state" itself, rather than a separate "agency or instrumentality" of the state. The "powers to declare and wage war" are among the "necessary concomitants" of sovereignty. United States v. Curtiss-Wright Export Corp., 299 U.S. 304, 318, 57 S.Ct. 216, 220, 81 L.Ed. 255 (1936). Since the passage of the Foreign Sovereign Immunities Act, the two federal cases to squarely consider the question have held that a foreign military force is a "foreign state" rather than an "agency or instrumentality of a foreign state." See Marlowe v. Argentine Naval Comm'n, 604 F.Supp.

703, 707 (D.D.C.1985); Unidyne, 590 F.Supp. at 400.[3] [FN3] Apart from authority it is hard to see what would count as the "foreign state" if its armed forces do not. Any government of reasonable complexity must act through men organized into offices and departments. If a separate name and some power to conduct its own affairs suffices to make a foreign department an "agency" rather than a part of the state itself, the structure of section 1608 will list too far to one side. We hold that the armed forces of a foreign sovereign are the "foreign state" and must be served under section 1608(a).

III.

[4] As relevant here, section 1608(a) requires that service on foreign states be made

> (3) ... by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or

---

[3] In Behring International, Inc. v. Imperial Iranian Air Force, 475 F.Supp. 383, 389 (D.N.J.1979), aff'd in part, 699 F.2d 657 (3d Cir.1983), the court allowed service on the Iranian Air Force under § 1608(b), but gave no reasons as the defendant did not contest the service. See Unidyne, 590 F.Supp. at 400 n. 1.

> (4) ... by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington....

28 U.S.C. §§ 1608(a)(3)-(a)(4).

Both district courts to hear the case found that Transaero effected service under section 1608(b). The record reveals that Transaero never attempted the methods of service prescribed in sections 1608(a)(3) and (a)(4), electing instead to serve the Bolivian Ambassador and Consul General in Washington, and the Bolivian First Minister and the Bolivian Air Force in La Paz--but never the Ministry of Foreign Affairs or the Secretary of State. [4] Before this court, Transaero does not claim that it strictly complied with section 1608(a), but rather asks that we pronounce the attempted service sufficient because the Bolivian government received actual notice of the suit.

The authorities generally hold that section 1608(b) may be satisfied by technically faulty service that gives adequate notice to the foreign state. See Sherer v. Construcciones Aeronauticas, S.A., 987 F.2d 1246, 1250 (6th Cir.), cert. denied, 510 U.S.

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[4] Transaero's brief states that the Ministry of Foreign Affairs was "provided with copies of the default judgment and underlying documents" in the fall of 1991. See Appellee's Br. at 6. The record, even the pages to which Transaero refers, shows no such thing.

818, 114 S.Ct. 72, 126 L.Ed.2d 41 (1993); Velidor v. L/P/G Benghazi, 653 F.2d 812, 821-22 (3d Cir.1981), cert. dismissed, 455 U.S. 929, 102 S.Ct. 1297, 71 L.Ed.2d 474 (1982); Harris Corp. v. National ***154 **92** Iranian Radio and Television, 691 F.2d 1344, 1352 (11th Cir.1982). In cases under section 1608(a), however, the decisions have rarely excused defective service. See Gerritsen v. Consulado General de Mexico, 989 F.2d 340, 345 (9th Cir.1993), cert. denied, 510 U.S. 828, 114 S.Ct. 95, 126 L.Ed.2d 62 (1994) (service inadequate for failure to include translation of complaint); Alberti v. Empresa Nicaraguense De La Carne, 705 F.2d 250, 253 (7th Cir.1983) (holding that service on Ambassador did not satisfy § 1608(a) requirement of service on "head of the ministry of foreign affairs"). But see Marlowe, 604 F.Supp. at 708 (using "substantial compliance" test under 1608(a)).

Leniency in this case would disorder the statutory scheme. The Committee Report states that section 1608(a) "sets forth the exclusive procedures for service on a foreign state," but contains no such admonition for section 1608(b). See H.R.REP. No. 1487 at 24, reprinted in 1976 U.S.C.C.A.N. at 6623. Section 1608(b)(3) allows simple delivery "if reasonably calculated to give actual notice," showing that Congress was there concerned with substance rather than form; but the analogous subsection of section 1608(a) says nothing about actual notice. The distinction is neatly tailored to the differences between "foreign states" and "agencies or instrumentalities." The latter, typically international commercial enterprises, often possess a sophisticated knowledge of the United States legal system that other organs of foreign governments may lack. Cf. Practical Concepts, Inc.

v. Republic of Bolivia, 811 F.2d 1543, 1546 (D.C.Cir.1987) (in suit against foreign state, the rule that objections to personal jurisdiction are waived by an appearance should be sparingly applied because of foreign unfamiliarity with legal process). Thus section 1608(a) mandates service of the Ministry of Foreign Affairs, the department most likely to understand American procedure. We hold that strict adherence to the terms of 1608(a) is required. As Transaero failed to do so, the Bolivian Air Force was not properly served.

IV.

The Eastern District of New York lacked personal jurisdiction, and the default judgment registered in the District of Columbia was therefore void and unenforceable. We reverse and remand with directions to dismiss the proceedings.

It is so ordered.

MIKVA, Chief Judge, dissenting:

The majority's standard for differentiating between those entities that are "foreign states" and those that are "agencies or instrumentalities" of foreign states under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1330, 1602-11, is attractive on administrability grounds. But I fear that in formulating their interpretation my colleagues have placed efficiency concerns--and perhaps their international policy preferences--above the apparent meaning of the statute. Because this case requires us to interpret Congress's enactment, and not to devise common-law rules, I think the majority's

approach is insufficiently deferential to the legislature. I therefore--reluctantly--dissent.

Before discussing the FSIA itself, it bears mentioning that another court--the United States District Court for the Southern District of New York (Mishler, J.)--has already decided the issue at hand. On April 28, 1989, Judge Mishler rendered a default judgment in this case against the Bolivian Air Force, La Fuerza Aerea Boliviana ("La Fuerza"). That judgment subsequently survived an appeal grounded upon plaintiff's alleged fraudulent misrepresentations to the court. Transaero, Inc. v. La Fuerza Aerea Boliviana, 24 F.3d 457 (2d Cir.1994). As a necessary element of the original default judgment, Judge Mishler found that La Fuerza, "an instrumentality of the Republic of Bolivia," received proper service of process under FSIA § 1608(b), which applies only to "an agency or instrumentality of a foreign state." 28 U.S.C. § 1608(b). Although it did not decide the issue, the Second Circuit acknowledged Judge Mishler's finding on appeal. 1994 Westlaw 197941 at n. 1.

Although I agree with my colleagues that Judge Mishler's ruling that service was proper does not preclude us from finding to the contrary, see maj. op. at 150 n. 1, such a finding would clash with the prevailing Second Circuit law on the facts of this case. Admittedly, the absence of analysis in Judge Mishler's and the Second Circuit's opinions limits their precedential effect on this issue. Nonetheless, a reversal here creates a disagreement in the result. We tell the parties that the statute compels one result; federal courts in another jurisdiction tell the same parties that the same statute compels

the opposite result. Between us, we have thoroughly muddled the law. This is the functional equivalent of a circuit split between our Circuit and the Second; such tension should be avoided if possible.

This tension would cause me far less concern were I convinced by the majority's interpretation of the FSIA. I am not. Despite the majority's able argument, the FSIA and its legislative history suggest no conclusive presumption that a military entity is "a foreign state" and not "an agency or instrumentality" thereof. Instead, the statute lists three factors that define "agency or instrumentality." 28 U.S.C. § 1603(b). The only disputed factor in this case is that the entity must be "a separate legal person." Id. § 1603(b)(1). The House Report amplifies the meaning of this phrase: an agency or instrumentality may be "a department or ministry which acts and is suable in its own name." H.R.Rep. No. 94-1487, 94th Cong., 2d Sess. 15-16 (1976); see maj. op. at 152, for a lengthier quote. This suggests to me that any presumption--let alone the conclusive presumption the majority adopts--is disfavored. Instead, every foreign entity starts out on the same footing, and a court must decide whether the particular entity is a separate legal person--that is, whether it "acts and is suable in its own name." I suspect the majority is right that most foreign military entities are not legally separate from their sovereign states, but I think it is contrary to the statute to cast this suspicion in terms of a rule.

Nothing in the language of the statute or in the remainder of its legislative history casts doubt upon the House Report's definition of "separate legal person." But the majority sweeps

aside this definition with its speculation that an agency or instrumentality must be a commercial, as opposed to a public, enterprise. Maj. op. at 151. This distinction is nowhere to be found in the statute or legislative history. Indeed, the distinction seems inapt, because the FSIA explicitly creates an exception to the general sovereign immunity of foreign states and their agencies and instrumentalities for "commercial activity," 28 U.S.C. § 1605(a)(2), but the statute in no way indicates that a similar test determines "agency" status. The FSIA waives immunity depending on the nature of the activity on which the lawsuit is based, not the nature of the government entity against which the suit is brought. In contrast, for secondary matters (service of process, venue, attachment of property, and punitive damages) the FSIA does distinguish based on the identity of the defendant--it distinguishes between a foreign state and its agencies and instrumentalities. See 28 U.S.C. §§ 1391, 1606, 1608, 1610. These are separate distinctions, with different consequences. Yet the majority assumes that the "two categories of actors ... correspond to the ... two categories of acts." Maj. op. at 151. Absent some concrete evidence of statutory intent, I think this is a dangerous assumption.

As its statutory evidence, the majority points to one of the venue provisions of 28 U.S.C. § 1391(f), permitting suits against an agency or instrumentality "in any judicial district in which the agency or instrumentality is licensed to do business or is doing business," 28 U.S.C. § 1391(f)(3), but permitting suits against a foreign state in the United States District Court for the District of Columbia. 28 U.S.C. § 1391(f)(4). What the majority neglects to mention is that § 1391(f)(3) is not

exclusive. If the agency or instrumentality is not "doing business," it may be sued "in any judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated." 28 U.S.C. § 1391(f)(1). The venue provision simply recognizes that many agencies and instrumentalities are commercial enterprises that may conveniently defend suits where they do business. It in no way establishes that an "agency or instrumentality" must always be a commercial enterprise.

The same response applies to the majority's assertion that the House Report "is at odds with itself," maj. op. at 152, because its examples of agencies and instrumentalities tend to be commercial enterprises, while at the same time it seems to adopt a broader general definition of "agency or instrumentality." Again, that many, even most, agencies and instrumentalities may be primarily commercial in nature does not prove that all must be. If Congress meant for commerciality to be a defining characteristic, it could have said so. Instead, Congress said "separate legal person." 28 U.S.C. § 1603(b)(1). In sum, I see no good reason to focus on a distinction between commercial and non- commercial activities as the touchstone of juridical separateness.

Then what does it mean to be legally separate? The House Report gives us a sketchy definition: an entity that "acts and is suable in its own name." In keeping with several district court precedents, the court below looked at contracts executed by La Fuerza, apparently in its own name, and at previous lawsuits in which La Fuerza was mentioned by name (admittedly, an

ambiguous indicator), to find that La Fuerza is a separate legal person. Cf. Bowers v. Transportes Navieros Ecuadorianos, 719 F.Supp. 166, 170 (S.D.N.Y.1989); Unidyne Corp. v. Aerolineas Argentinas, 590 F.Supp. 398, 400 (E.D.Va.1984). Although I would prefer more extensive factfinding with regard to La Fuerza's activities--e.g., property ownership, previous contracting history--I think the district court was on the right track.

I think the language, policy, and legislative history of the FSIA suggest that commercial activity is not the ultimate touchstone for FSIA analysis. It makes more sense to engage in a wider factual inquiry into the actions of the entity to determine whether it is a separate legal person. Because I think the district court was basically correct, and because I would prefer to avoid incongruity with the law of this case in the Second Circuit, I respectfully dissent from the majority opinion.

Appendix N

UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 92-7222 **September Term, 1993**
USDC Ms. No. 91-0139

Transaero, Inc.,
Appellee

Filed: Sep 15, 1994

v.

La Fuerza Aerea Boliviana,
Appellant

BEFORE: Williams and Sentelle, Circuit Judges

ORDER

Upon consideration of appellee's petition for rehearing filed August 29, 1994, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam
FOR THE COURT:
RON GARVIN, CLERK
BY:
Robert A. Bonner
Deputy Clerk

Appendix O

Appendix O

UNITED STATES COURT OF APPEALS
For The District Of Columbia Circuit

No. 92-7222 **September Term, 1993**
USDC Ms. No. 91-0139

Transaero, Inc.,
Appellee
v.
La Fuerza Aerea Boliviana,
Appellant

Filed: Sep 15, 1994

BEFORE: Edwards, Chief Judge; Wald, Mikva, Silberman, Buckley, Williams, Ginsburg, Sentelle, Henderson, Randolph and Rogers, Circuit Judges

ORDER

Appellee's Suggestion For Rehearing In Banc has been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing it is

ORDERED, by the Court in banc, that the suggestion is denied.

Per Curiam

FOR THE COURT:
RON GARVIN, CLERK

Appendix O

BY:
Robert A. Bonner
Deputy Clerk

Circuit Judges Mikva and Ginsburg did not participate in this matter.

Appendix P

Appendix P

115 S.Ct. 1101 (Mem)
130 L.Ed.2d 1068, 63 USLW 3618, 63 USLW 3625
(Cite as: 513 U.S. 1150, 115 S.Ct. 1101)

TRANSAERO, INC., petitioner,

v.

LA FUERZA AEREA BOLIVIANA.

No. 94-1054.

SUPREME COURT OF THE UNITED STATES

Feb. 21, 1995.

Case below, 308 U.S.App.D.C. 86, 30 F.3d 148.

Petition for writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit denied.

Appendix Q

Appendix Q

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
UNITED STATES COURTHOUSE
40 FOLEY SQUARE - ROOM 1702
NEW YORK, N.Y. 1007

George Lange III
Clerk

General Information
(212) 791-0103

August 23, 1994

Ronald N. Cobert, Esq.
Robert L. Cope, Esq.
Andrew M. Danas, Esq.
Grove, Jaskiewicz and Cobert
Suite 400
1730 M Street, N.W.
Washington, DC 20036

Re: Transaero v. La Fuerza Aerea Bolivia, No. 93-7903

Dear Counsel:

The panel that heard the above-captioned case requests a response within twenty (20) days to the petition for rehearing, specifically discussing why this Court should not grant the petition, withdraw its opinion, and remand with directions to dismiss the case in light of the decision of the District of Columbia Court of Appeals concluding that the Eastern District of New York lacked jurisdiction.

Very truly yours,

George Lange III, Clerk

GLIII/yb

cc: Gregory B. Craig, Esq.
Timothy S. Driscoll, Esq.
William & Connolly
725 12th St., NW
Washington, DC 20005

Panel

Appendix R

Appendix R

(Transaero III)

38 F.3d 648

(Cite as: 38 F.3d 648)

TRANSAERO, INC., Plaintiff-Appellee,

v.

LA FUERZA AEREA BOLIVIANA, an Instrumentality of the Republic of Bolivia, a Foreign State, Defendant-Appellant.

Docket No. 93-7903.

United States Court of Appeals,
Second Circuit.

Submitted Sept. 28, 1994.

Decided Oct. 19, 1994.

Bolivian Air Force moved for relief from default judgment entered against it in action brought by aircraft parts supplier on an account. The United States District Court for the Eastern District of New York, Jacob Mishler, J., denied relief. Air Force appealed. The Court of Appeals, 24 F.3d 457, affirmed. Air Force moved for rehearing. The Court of Appeals, Jon O. Newman, Chief Judge, held that: (1) decision of Court of Appeals for the District of Columbia, holding default judgment unenforceable in District because service of process had not been properly made on foreign defendant, was not a circumstance requiring Court of Appeals to grant rehearing, and (2) remand was appropriate to allow district court to consider proper date for cessation of interest.

Appendix R
(*Transaero III*)

Motion for rehearing granted in part, denied in part.

Ronald N. Cobert, Washington, DC (Grove, Jaskiewicz and Cobert, Andrew M. Danas, of counsel), for plaintiff-appellee.

Gregory B. Craig, Washington, DC (Williams & Connolly, James W. Shannon, Jr., of counsel), for defendant-appellant.

Before: NEWMAN, Chief Judge, VAN GRAAFEILAND, Circuit Judge, and LASKER, [FN*] District Judge.

FN* The Honorable Morris E. Lasker of the United States District Court for the Southern District of New York, sitting by designation.

PETITION FOR REHEARING

JON O. NEWMAN, Chief Judge:

Pending before us is a petition for rehearing of our May 19, 1994, decision, 24 F.3d 457, affirming the District Court's denial of a motion, pursuant to Fed.R.Civ.P. 60(b). The motion sought to vacate a default judgment obliging defendant La Fuerza Aerea Boliviana (the Bolivian Air Force) ("BAF") to pay plaintiff Transaero, Inc. $983,696.60. The petition arises in an unusual procedural context that prompts this brief opinion.

In the course of the default proceedings in the District Court, Judge Mishler ruled on April 21, 1989, that BAF had been given proper notice of Transaero's complaint and of the hearing

that led to entry of the default judgment. After entry of the default judgment, Transaero brought suit in the District Court for the District of Columbia to enforce its judgment. BAF sought summary judgment to dismiss the enforcement proceedings on the ground of improper service of the complaint in the Eastern District action. The late Judge Revercomb denied that motion on September 25, 1992. BAF appealed the interlocutory ruling, see Foremost-McKesson, Inc. v. Islamic Republic of Iran, 905 F.2d 438, 443 (D.C.Cir.1990) (denial of claim of sovereign immunity appealable as collateral order).

While the D.C. Circuit appeal was pending, BAF filed a motion under Rule 60(b) in the Eastern District of New York to vacate the default judgment. BAF relied primarily on a claim that the default judgment had been obtained by fraud, a claim based on representations by Transaero's counsel in support of the entry of default judgment. Judge Mishler denied the Rule 60(b) motion on August 12, 1993, and BAF appealed that ruling to this Court.

In its appeal, BAF primarily renewed its contention that the default judgment had been obtained by fraud. Its appellate brief also contended that the default judgment should have been vacated because BAF had no "actual" notice of the judgment until February 28, 1992, almost three years after the judgment was entered. The brief referred to this notice as notice "pursuant to section 1608(e)" of the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1602-1611 (1988). Brief for Appellant at 41 n. 12. BAF contended that the lateness of the notice of the judgment, along with other considerations, amounted to "extraordinary circumstances," see

Ackermann v. United States, 340 U.S. 193, 199, 71 S.Ct. 209, 212, 95 L.Ed. 207 (1950), justifying Rule 60(b) relief. The brief did not contend that defective service of the complaint impaired the validity of the Eastern District judgment.

In its reply brief, however, BAF asserted that it had not been properly served with notice of either the suit or the March 1989 inquest that led to the entry of the default judgment. It made this assertion in the course of answering Transaero's argument that Judge Revercomb's ruling in the District of Columbia had a preclusive effect on the issue of adequacy of notice of the suit. BAF responded that Judge Revercomb's ruling had no preclusive effect because it was an interlocutory ruling, citing Lummus Co. v. Commonwealth Oil Refining Co., 297 F.2d 80, 89-90 (2d Cir.1961). "There is literally no judgment in that case [the District of Columbia litigation] yet--let alone a final judgment." Reply Brief for Appellant at 9. BAF also contended that preclusion was inapplicable because "the issue of notice had nothing to do with [Judge Revercomb's] order." Id.

At oral argument on the appeal, both sides took the position that the adequacy of the notice that initiated the Eastern District suit would be resolved by the then-pending appeal in the D.C. Circuit from Judge Revercomb's ruling. On May 19, 1994, we affirmed Judge Mishler's denial of the Rule 60(b) motion. 24 F.3d 457 (2d Cir.1994). Our decision rejected the claim of a fraud on the court, but remanded to permit the District Court to reconsider two aspects of the interest calculation--the proper starting date for the running of interest and the proper interest rate. The only reference in the opinion to the issue of defective

notice of the suit is a footnote acknowledging BAF's contention and noting that Judges Mishler and Revercomb had rejected BAF's argument and that Judge Revercomb's ruling was on appeal. Id. at 459 n. 1.

On July 6, 1994, BAF filed the pending petition for rehearing. The petition primarily contended that the remand should be expanded to include consideration of the proper ending date for the running of interest. The petition also urged that we stay our mandate until BAF's jurisdictional challenges have been adjudicated in the D.C. Circuit.

On July 29, 1994, the D.C. Circuit decided the appeal from Judge Revercomb's ruling and reversed. Transaero v. La Fuerza Aerea Boliviana, 30 F.3d 148 (D.C.Cir.1994). By a divided vote, the Court ruled that BAF is a "foreign state" rather than an "agency or instrumentality of a foreign state" for purposes of section 1608 of the FSIA and that service was not properly accomplished pursuant to subsection 1608(a), applicable to service on a foreign state, although it may have sufficed under subsection 1608(b), applicable to service on an agency or instrumentality of a foreign state. The Court concluded that the Eastern District of New York lacked personal jurisdiction and that the default judgment was void and unenforceable; the enforcement proceedings in the District of Columbia were ordered dismissed. A petition for rehearing with a suggestion for rehearing in banc was denied on September 15, 1994.

We then invited the parties' views as to whether the default judgment should now be vacated. In response, both sides have

substantially altered their prior positions. Transaero now contends that the D.C. Circuit's opinion should not cause us to vacate the default judgment because (a) the opinion is incorrect on the merits, (b) BAF is precluded by judicial estoppel from abandoning the position it has taken in prior litigation before the courts of this Circuit that it is an instrumentality of the Republic of Bolivia, and (c) this Court's affirmance of Judge Mishler's denial of the Rule 60(b) motion is a ruling implicitly upholding the jurisdictional validity of the default judgment that should have been accorded preclusive effect in the District of Columbia.

For its part, BAF abandons the contention, urged on the appeal to this Court, that Judge Revercomb's ruling had no preclusive effect because it was interlocutory, and now contends that his ruling, until reversed, had preclusive effect on the issue of statutory service and prevented BAF from raising the issue of defective service when it filed its Rule 60(b) motion in the Eastern District of New York. BAF urges that the preclusive effect of the D.C. Circuit's opinion in its favor requires us now to vacate the default judgment.

1. Turning first to the significance of the D.C. Circuit's opinion on the pending petition, we conclude that whatever preclusive effect that decision might have on issues that are open for decision in any court, it is not a circumstance requiring us to grant BAF's petition for rehearing. That petition afforded BAF an opportunity to indicate "the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended." Fed.R.App.P. 40(a). BAF's petition for rehearing did not assert that we had overlooked or

misapprehended any aspect of its contention regarding defective service. Indeed, it is by no means clear that BAF's initial appeal had urged us to reverse the denial of the Rule 60(b) motion for lack of defective service. In short, we have now pending no open issue on which the preclusive effect of the D.C. Circuit's decision, if any, may operate. Therefore, without expressing any views as to (a) the validity of Transaero's service upon BAF in initiating the Eastern District suit or (b) whether the default judgment is impaired by the allegedly late notice of its entry, we decline to grant the petition for rehearing just because the D.C. Circuit has ruled that the default judgment is not enforceable in the District of Columbia. We need not decide whether BAF is entitled to pursue a new Rule 60(b) motion in the Eastern District, now that the D.C. Circuit has declared the default judgment to be void.

2. With respect to the calculation of interest, we think that BAF's contention concerning the scope of the remand has merit. Its brief on the appeal from the denial of the Rule 60(b) motion complained not only about the two points mentioned in the panel's opinion (the interest started too early and the rate exceeded the contract rate) but also about the proper date for cessation of interest. Brief for Appellant at 21. We see no reason not to broaden the remand to permit the District Court to consider the proper date for the cessation of interest, and Transaero's opposition papers are silent on this question.

3. With respect to the mandate, BAF appears to have sought a stay of our mandate only until the conclusion of the D.C. Circuit's consideration of the appeal in that court. However, since Transaero has represented that it will seek a writ of

certiorari to have that decision reviewed by the Supreme Court, we will stay our mandate until the petition for certiorari is decided, and, if granted, until decision by the Supreme Court.

Accordingly, the petition for rehearing is granted only to the limited extent of broadening the remand to include consideration of the cessation of interest, and is otherwise denied. The mandate is stayed.

Appendix S

Appendix S

MANDATE

United States Court of Appeals
for the
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 19th day of May, one thousand nine hundred and ninety-four.

Present: HON. JON O. NEWMAN, Chief Judge
HON. ELLSWORTH VAN GRAAFEILAND,
Circuit Judges.
HON. MORRIS E. LASKER,
District Judge.

TRANSAERO, INC.,

Plaintiff-Appellee,

-against-

Docket No.
93-7903

LA FUERZA AEREA BOLIVIANA,
an instrumentality of the Republic of
Bolivia, a Foreign State,

Defendant-Appellant.

Appendix S

Appeal from the United States District Court for the Eastern District of New York.

This cause came on to be submitted on the transcript of record from the United States District Court for the Eastern District of New York and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged and decreed that the order of said district court be and it hereby is remanded for the limited purpose of assessing the mathematical accuracy of the default award to plaintiff-appellee Transaero, Inc. Transaero's application for damages, including attorney's fees and costs on appeal, denied in accordance with the opinion of this Court.

GEORGE LANGE III, Clerk
By:

Edward J. Guardaro,
Staff Attorney

Issued as mandate, March 27, 1995

Appendix T

Appendix T
(*Transaero IV*)

99 F.3d 538
(Cite as: 99 F.3d 538)

TRANSAERO, INC., Plaintiff-Appellee,
v.
LA FUERZA AEREA BOLIVIANA, an Instrumentality of the Republic of Bolivia, a Foreign State, Defendant-Appellant.

No. 1501, Docket 95-7855.

United States Court of Appeals,
Second Circuit.

Argued April 26, 1996.

Decided Nov. 6, 1996.

Seller of aviation parts sued Bolivian Air Force (BAF) to recover principal and interest under credit agreement. The seller obtained default judgment in the United States District Court for the Eastern District of New York, which then denied BAF's motion to vacate. The Court of Appeals, 24 F.3d 457, affirmed, but, on motion for rehearing, 38 F.3d 648, granted the motion in part and remanded. The District Court, Jacob Mishler, J., denied BAF's new motion to vacate. BAF appealed. The Court of Appeals, Van Graafeiland, Circuit Judge, held that: (1) there was no final judgment where district court had yet to rule on issues of appropriate interest rate and proper period during which to assess interest, and (2) denial of

motion to vacate for lack of jurisdiction was not immediately appealable collateral order.

Appeal dismissed without prejudice for lack of appellate jurisdiction.

James W. Shannon, Jr., Washington, DC (Gregory B. Craig, Williams & Connolly, Washington, DC, of counsel), for Defendant-Appellant.

Andrew M. Danas, Washington, DC (Ronald N. Cobert, Grove, Jaskiewicz & Cobert, Washington, DC, of counsel), for Plaintiff-Appellee.

Before: VAN GRAAFEILAND, Circuit Judge, [FN*] and CARTER, District Judge. [FN**]

> FN* The Honorable J. Daniel Mahoney, who was a member of the panel, died on October 23, 1996, and the appeal is being decided by the remaining two members of the panel, who are in agreement. See Local Rule § 0.14(b).
>
> FN** The Honorable Robert L. Carter, United States District Judge for the Southern District of New York, sitting by designation.

VAN GRAAFEILAND, Circuit Judge:

Fuerza Aerea Boliviana ("BAF") appeals from an order of the United States District Court for the Eastern District of New

Appendix T
(*Transaero IV*)

York (Mishler, J.) denying its motion to vacate a default judgment in favor of Transaero, Inc. We dismiss the appeal for lack of appellate jurisdiction without prejudice to BAF's right to appeal from the final judgment when entered.

This action arises out of a credit agreement between BAF and Transaero entered into in May 1981. The agreement established an open account upon which BAF could purchase aviation equipment from Transaero. The agreement also provided that BAF would pay interest at 1.75% per month (21% per annum) on all purchases not paid within 120 days of shipment. Between 1981 and 1982 BAF's purchases resulted in a principal balance of $598,115.76 on the account. Although BAF paid $648,115.76 on the debt during the next four years, Transaero sued on September 8, 1988 to recover $983,696.60 allegedly owed to it for outstanding principal and interest.

BAF failed to answer the complaint or to appear at a scheduled default judgment hearing, and on April 28, 1989 the district court entered a default judgment in the amount requested. In 1991 Transaero registered and sought to enforce the judgment in the United States District Court for the District of Columbia. BAF appeared in that action and sought summary judgment opposing enforcement, arguing that there had been improper service of process in the Eastern District under the Foreign Sovereign Immunities Act of 1976 ("FSIA"), Pub.L. No. 94-583, 90 Stat. 2891 (codified as amended in scattered sections of 28 U.S.C.). The court denied the motion on September 25, 1992. BAF appealed to the United States Court of Appeals for the District of Columbia Circuit.

Appendix T
(Transaero IV)

While the appeal was pending, BAF moved under Rule 60(b) in the Eastern District to vacate the default judgment. Although BAF's principal argument was that the default judgment had been procured by fraud, its motion papers contained the following proposed reservation of issues:

> The Air Force [BAF] has appealed Judge Revercomb's opinion [to the D.C. Circuit]. See Exh. 19 (notice of appeal). The Air Force acknowledges that until overturned on its pending appeal, Judge Revercomb's opinion bars the Air Force from challenging the propriety of service under the [FSIA]. See Huron [Holding] Corp. v. Lincoln [Mine Operating] Co., 312 U.S. 183, 188-89 [61 S.Ct. 513, 515-16, 85 L.Ed. 725] (1941) (judgment on appeal is still final judgment); Petrella v. Siegel, 843 F.2d 87, 90 (2d Cir.1988) (judgment pending appeal entitled to res judicata effect); United States v. NYSCO [Nysco] Laboratories, Inc., 318 F.2d 817 (2d Cir.1963) (same). Although barred by res judicata from contesting it, the Air Force in no way waives these issues. In this, its first responsive pleading, the Air Force preserves its challenges to Transaero's improper service of process and this Court's lack of personal and subject-matter jurisdiction under the [FSIA] and the United States Constitution.

Appendix T
(*Transaero IV*)

On August 12, 1993, the Eastern District denied BAF's motion to vacate the judgment and BAF then appealed to this Court.

In Transaero, Inc. v. La Fuerza Area Boliviana, 24 F.3d 457 (2d Cir.1994) ("Transaero I "), we upheld the Eastern District's decision, finding no abuse of discretion in the denial of BAF's claim of fraud on the court. Noting Transaero's failure to address BAF's claims regarding the district court's calculation of interest, we held that there remained two questions regarding "the accuracy of the interest calculation on which the award to Transaero was based." Id. at 462-63. Accordingly, we remanded to the district court for consideration of the proper starting date for the running of interest and the correct interest rate to be used. BAF filed a Petition for Rehearing and asked among other things that this Court "hold its remand in abeyance, and thereby stay the mandate until the D.C. Circuit decided the pending appeal." BAF also raised a question regarding the termination of the accrual of interest under the contract.

While BAF's petition was pending, the Court of Appeals for the District of Columbia Circuit handed down a decision reversing Judge Revercomb. Transaero, Inc. v. La Fuerza Aerea Boliviana, 30 F.3d 148 (D.C.Cir.1994) ("Transaero II "), cert. denied, --- U.S. ----, 115 S.Ct. 1101, 130 L.Ed.2d 1068 (1995). The Court of Appeals held that the Eastern District lacked personal jurisdiction over BAF under the FSIA because, although service of the complaint complied with the FSIA's provision for serving an agency or instrumentality of a foreign state (28 U.S.C. § 1608(b)), BAF was an alter ego of a foreign

state and service upon it had to comply with the more stringent requirements of 28 U.S.C. § 1608(a). The Court therefore concluded that the entry of default judgment in the Eastern District was "void and unenforceable." Id. at 154. Transaero filed a Petition for Rehearing, a Suggestion for Rehearing In Banc, and a Petition for a Writ of Certiorari, all of which were denied.

After Transaero II, this Court sua sponte requested the parties to brief the issue of the preclusive effect of the D.C. Circuit's holding. With the parties' added wisdom in hand, we decided that

> whatever preclusive effect that decision [Transaero II] might have on issues that are open for decision in any court, it is not a circumstance requiring us to grant BAF's petition for rehearing. That petition afforded BAF an opportunity to indicate "the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended." Fed. R.App. P. 40(a).... [W]e have now pending no open issue on which the preclusive effect of the D.C. Circuit's decision, if any, may operate.

Transaero, Inc. v. La Fuerza Aerea Boliviana, 38 F.3d 648, 650 (2d Cir.1994) ("Transaero III "). We stated, however, that we were ruling "without expressing any views as to ... the validity of Transaero's service upon BAF in initiating the Eastern District suit ... [or] whether BAF is entitled to pursue

a new Rule 60(b) motion in the Eastern District, now that the D.C. Circuit has declared the default judgment to be void." Id. All we did was broaden the remand to allow the district court to consider the proper ending date for the assessment of interest.

Following the case's return to the district court, BAF brought the Rule 60(b)(4) motion which led to this appeal, asserting that the default judgment was void for lack of proper service and that the ruling of the Court of Appeals for the District of Columbia Circuit was res judicata. The district court denied the motion and ordered that expedited discovery begin in preparation for a hearing to determine the interest rate and interest period to be used in calculating the award. BAF appealed and we granted a stay of the proceedings in the district court.

"Determinations of liability that leave unresolved questions of remedy ordinarily are not final.... The need to resolve a disputed and not routine question of interest ... defeats finality." 15B C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3915.2 at 271-74. Although a final decision may be entered if only "ministerial proceedings" remain, id. at 271, this is a narrow exception reserved for the case where an award can be executed after a simple arithmetic calculation or where there remains only some other mechanical task to be performed. In the instant case, however, the appropriate interest rate and the interest period remain as disputed issues. The district court still must determine the proper period during which to assess interest and has ordered discovery in order to obtain Transaero's records of BAF's account for this purpose.

Moreover, it is an open question whether Transaero is entitled to compound interest under the contract and applicable law. Because the district court has yet to rule on these issues, there has been no final judgment.

By its own terms, Rule 60(b) applies only to judgments that are final. Although a district court is vested with the power to revisit its decisions before the entry of final judgment and is free from the constraints of Rule 60 in so doing, see Cohn v. United States, 259 F.2d 371, 376 (6th Cir.1958), the denial of a motion to effect such a reconsideration is immediately appealable only if the determination at issue falls within one of the narrow exceptions to the final judgment rule. The collateral order doctrine of Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 69 S.Ct. 1221, 93 L.Ed. 1528 (1949), is one of those exceptions, and BAF contends that it supports our appellate jurisdiction in the instant case. In Cohen, the Supreme Court stated that although most trial court decisions can be reviewed effectively on appeal from the final judgment, certain rights may be irreparably lost if immediate appeal is not permitted. Id. at 546, 69 S.Ct. at 1225-26. One such right is the right of immunity, i.e., the right not to be sued at all. See Imbler v. Pachtman, 424 U.S. 409, 417-20, 96 S.Ct. 984, 988-90, 47 L.Ed.2d 128 (1976). BAF attempts to bring the instant case within the ambit of this immunity defense by arguing that "federal courts have appellate jurisdiction to hear an interlocutory appeal involving a foreign sovereign's amenability to suit--including questions of personal jurisdiction...." Appellant's Reply Brief at 3-4. This attempt must fail. "[T]o fall within the Cohen exception, an order must satisfy at least three conditions: It must conclusively determine

the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." Lauro Lines s.r.l. v. Chasser, 490 U.S. 495, 498, 109 S.Ct. 1976, 1978, 104 L.Ed.2d 548 (1989) (internal quotation marks omitted). Because BAF's right not to be subject to a binding judgment may be effectively vindicated following final judgment, the denial of the claim of lack of jurisdiction is not an immediately appealable collateral order. Van Cauwenberghe v. Biard, 486 U.S. 517, 526- 27, 108 S.Ct. 1945, 1951-52, 100 L.Ed.2d 517 (1988).

It is unfortunate that dismissal of the appeal will cause additional delay and expense which eventually may prove to have been unnecessary. However, "the possibility that a ruling may be erroneous and may impose additional litigation expense is not sufficient to set aside the finality requirement imposed by Congress." Richardson-Merrell Inc. v. Koller, 472 U.S. 424, 436, 105 S.Ct. 2757, 2764, 86 L.Ed.2d 340 (1985).

The appeal is dismissed without prejudice to BAF's right to appeal from the final judgment when entered.

Appendix U

Appendix U

117 S.Ct. 1843 (Mem)
137 L.Ed.2d 1047, 65 USLW 3779, 65 USLW 3781
(Cite as: 520 U.S. 1240, 117 S.Ct. 1843)

LA FUERZA AEREA BOLIVIANA, etc., petitioner,

v.

TRANSAERO, INC.

No. 96-1507.

SUPREME COURT OF THE UNITED STATES

May 27, 1997.

Case below, 24 F.3d 457; 38 F.3d 648; 99 F.3d 538.

Petition for writ of certiorari to the United States Court of Appeals for the Second Circuit denied.

Appendix V

Appendix V
(Sept. 18, 1997 EDNY Decision)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
_____X

TRANSAERO, INC.,
Plaintiff

-against-

LA FUERZA AEREA BOLIVIANA,
an Instrumentality of THE REPUBLIC
OF BOLIVIA, a Foreign State
Defendant.

CV-88-2788
Memorandum of
Decision and Order
September 18, 1997

_____X

APPEARANCES:

For the Plaintiff:

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New York, N.Y. 10022

GROVE, JASKIEWICZ and COBERT
Ronald N. Cobert, Esq.
Andrew M. Danas, Esq.
1730 M Street, N.W., Suite 400
Washington, D.C. 20036

For the Defendant:

WILLIAMS & CONNOLLY
Jonathan P. Graham, Esq.

Appendix V
(Sept. 18, 1997 EDNY Decision)

Paul A. Murphy, Esq. PM 8819
John T. Parry, Esq.
Jonathan L. Marcus, Esq.
725 Twelfth Street, N.W.
Washington, D.C. 20005

MISHLER, District Judge:

The following Memorandum of Decision and Order is Pursuant to a remand by the Court of Appeals for the Second Circuit ("Second Circuit") for a determination of three specific issues ("remand issues") and follows a period of discovery ordered by this Court with respect to these issues.

BACKGROUND

Although the parties are no strangers to the facts of this case, a brief and general summary of te events leading to the present decision is useful.[1]

Plaintiff, Transaero, Inc. ("Transaero"), filed suit on September 8, 1988 against defendant, La Fuerza Aerea Boliviana ("the Air Force"), seeking $983,696.60 in damages from the Air Force based upon a number of theories involving a credit agreement entered in May 1981 between Transaero and the Air Force for the sale of aircraft parts. Since the Air Force failed to answer or file an appearance in response to Transaero's complaint, Transaero moved for a default

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[1] Familiarity with the prior opinions of both this case and the Second Circuit relating to this case is also assumed.

judgment. After a hearing on the matter, to which the Air Force failed to appear, the Court granted a default judgment on April 21, 1989 for the amount specified in Transaero's complaint. The clerk entered judgment for the plaintiff on April 28, 1989.

After four years, the Air Force made its first appearance in this Court by filing a motion pursuant to Rule 60(b) to set aside the default judgment on the grounds that the judgment was obtained by fraud on the Court. The Court denied the motion and the Air Force appealed. See Transaero, Inc. v. La Fuerza Aerea Boliviana, No. 88-CV-2788 (E.D.N.Y. August 12, 1993) ("Transaero I").

On May 19, 1994 the Second Circuit affirmed this Court's denial of the 60(b) motion and remanded the case for the limited purpose of re-examining the mathematical accuracy of the amount of the default judgment. More specifically the Second Circuit stated:

> Although we conclude that the district court properly denied BAF's Rule 60(b) application, there remain two questions raised by BAF as to the accuracy of the interest calculation on which the award to Transaero was based, neither of which has been specifically answered by Transaero. First, BAF contends in its brief on appeal that interest cannot have accrued against it of 86 months-as Transaero claimed in the complaint-because a period of 86 months allegedly would have commenced before BAF

> made its first purchase from Transaero on June 22, 1981. Second, BAF presents evidence on this motion that Transaero's interest calculations were incorrect and ranged from 20.99% per year to 26.34% per year. (Barker Aff. ¶ 18). We remand for the limited purpose of assessing the factual accuracy of the two claims described above and, if necessary, recalculating the award to Transaero accordingly.

Transaero, Inc. v. La Fuerza Aerea Boliviana, 24 F. 3d 457, 462-63 (2d Cir. 1994) ("Transaero II").

The Air Force petitioned the Second Circuit for rehearing, arguing that the remand should include consideration of the proper ending date for the running of interest. The Air Force also argued for a stay of mandate until its jurisdictional challenges against Transaero were adjudicated in the District of Columbia Circuit ("DC Circuit").[2] While the petition in the Second Circuit was pending, the DC Circuit issued a decision holding that the Eastern District of New York lacked personal jurisdiction over the Air Force to enter the default judgment. See Transaero, Inc. v. La Fuerza Aerea Boliviana, 30 F. 3d 148

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[2] When Transaero attempted to enforce this Court's default judgment in the District Court for the District of Columbia ("DC District Court"), the Air Force brought a motion for summary judgment to dismiss the proceedings, claiming that the complaint was improperly served pursuant to the requirements of the Foreign Sovereign Immunities Act. The DC District Court denied the motion.

(D.C. Cir. 1994).[3] After requesting that the parties' brief the issue of whether the default judgment should be vacated in light of the DC Circuit's opinion, the second Circuit denied the Air Force's petition for rehearing on October 19, 1994 with respect to the jurisdiction issue. However, they did expand the scope of the remand to include consideration of "the proper date for the cessation of interest." Transaero, Inc. v. La Fuerza Aerea Boliviana, 38 F. 3d 648, 650 (2d Cir. 1994) ("Transaero III").

The Air Force then filed a second Rule 60(b) motion (clause (4)) in this Court to set aside the default judgment and to dismiss the complaint for lack of personal jurisdiction in light of the DC Circuit's decision. Transaero cross-moved to increase the amount of the default judgment.

This Court held that the Air Force waived its right to challenge personal jurisdiction by entering an appearance in this Court and by appealing to and making a motion for reconsideration to the Second Circuit. We held further that the default judgment was not subject to collateral attack and reserved decision on Transaero's cross-motion to increase the amount of the default judgment. This Court also granted the Air Force's request for additional discovery with respect to the remand issues. Transaero, Inc. v. La Fuerza Aerea Boliviana, No. 880-CV-2788 (E.D.N.Y. August 5, 1995).

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[3] Transaero's petition for certiorari in connection with the DC case was denied by the Supreme Court. 513 U.S. 1150 (1995).

The Air Force appealed the denial of the Rule 60(b)(4) motion. The Second Circuit dismissed the appeal on the grounds that the court lacked jurisdiction, holding that the denial of the Air Force's motion was not a final judgment because the remand issues relating to interest had yet to be addressed. In so holding, the Second Circuit specifically stated that "it is an open question whether Transaero is entitled to compound interest under the contract and applicable law." Transaero, Inc. v. La Fuerza Aerea Boliviana, 99 F.3d 538, 541 (2d Cir. 1996), cert. denied, __U.S.__, 117 S. Ct. 1843 (1997) ("Transaero IV").

This Court then ordered the parties to appear for a hearing to state their positions with respect to the issues remanded by the Second Circuit. Transaero, Inc. v. La Fuerza Aerea Boliviana, No. 88-CV-2788 (E.D.N.Y. January 16, 1997). A hearing was held after the Supreme Court denied the Air Force's petition for certiorari of the Second Circuit's decision in Transaero IV. 117 S. Ct. 1843 (1997).

Prior to the hearing, the Air Force indicated that it no longer intended to contest the first issue of the Second Circuit's remand, i.e., the appropriate starting date for the interest calculation.[4] The parties agree that the appropriate starting date is 120 days after Transaero's first shipment of goods to the Air Force (TR. at 2-3). Transaero concedes that certain invoices

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[4] See Memorandum In Support of Defendant's Motion to Set Aside The Judgment, And In Opposition To Plaintiff's Renewed Motion To Modify The Judgment at 1, n.1 and the transcript of the July 29, 2997 hearing at 2-3 (hereinafter "Tr. at__").

charged an improper amount of interest.[5] Therefore, the remaining issues on remand are (i) when did interest cease to accrue and (ii) is Transaero entitled to compound interest?

FINDINGS OF FACT

As mentioned above, Transaero and the Air Force entered into an agreement in May 1981. The agreement allowed for Transaero to purchase on an open account up to $350,000. (Defendant's Exhibit 1 (hereinafter "DX___")). The Air Force agreed to make payment within 120 days after Transaero shipped goods or be charged 1 3/4% interest each month until it made payment on "all outstanding invoices". This agreement discusses that the impetus for the interest charge was the Air Force's delay in paying its previous debts."[6]

Beginning in May 1982, about a year after the date of the contract, Transaero began transmitting monthly bills to the Air Force listing the Air Force's purchases. (Plaintiff's Supplementary Exhibit B at T202 (hereinafter "PX Supp. Ex. B at __").[7] The first bill reflects that the Air Force's first purchase was on June 22, 1981. The bill has several columns

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[5] See Response Memorandum Of Plaintiff Transaero, Inc. In Opposition To Defendant's Motion To Set Aside The Judgment, Or In the Alternative, To Modify And Decrease The Judgment at 2.

[6] The agreement states that some of the delays were over a year.

[7] Transaero referred to these bill statements as "invoices"; however, to avoid confusion with the individual invoice amounts which reflect the Air Force's purchases, we refer to the bill statements as "bills."

of information, the most important of which are the columns listing (i) the invoice number; (ii) the invoice date; (iii) the amount of the particular invoice (which is the principal amount for a particular purchase and is referred to in the bill as "AMOUNT"); and (iv) the interest amount (referred to in the bill as "INTEREST").

The amount of a particular invoice remained the same month to month, but, the amount of interest for each invoice increased. Nowhere does the bill specifically state that compound interest or "interest on interest" was being charged. Some of the invoice amounts were posted a few months after the 120 month expiration.

Originally, at the bottom of the interest column as total amount of interest appeared representing the interest accrued on all of the outstanding invoices. Beginning in October 1983, the bills began to delineate what appears to be the total amount of interest up to the date of the bill, the total amount of interest up to a certain date, and the amount of interest charged for the month preceding the date of the bill (PX Supp. Ex. B at T136).[8] The last purchase was on April 14, 1982. Thus, the Air Force purchased on the account for almost ten months without making a payment.[9]

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[8] This section of the bill is written in Spanish.

[9] The March 1984 bill illustrates that Transaero subtracted a certain amount from the total invoice amount and subtracted another, different, amount from the total interest amount. These subtractions represent canceled invoices (PX Supp. Ex. B at T8; Tr. at 77). The same subtractions were repeated on subsequent bills until the November 1, 1984

Appendix V
(Sept. 18, 1997 EDNY Decision)

In June 1984, Mr. Daniel Dalton, a regional sales manager for Transaero, met with various representatives of the Air Force (DX 42; DX 43). Mr. Dalton understood that the as a result of the meeting, the Air Force would provide Transaero with a payment schedule approved by the Ministry of Finance. (Id.) In October the Air Force stated in a letter to Transaero that it would pay Transaero $300,000 within the next few days and the remaining amount of the debt within the next ninety days. The Air Force asked Transaero to waive the interest between the first and second payments (DX 27).

Thereafter, the Air Force made a payment to Transaero on October 30, 1984 for $386,823.69 (PX Supp. Ex. C at T234; DX 2). The November 1, 1984 bill did not reflect the Air Force's payment and there were no further bills sent to the Air Force until July 31, 1985, almost nine months later (PX Supp. Ex. B at T87). The July 1985 bill shows a total invoice or principal amount of $216,427.47 representing that $381,688.29[10] was subtracted from the previous total invoices amount (PX Supp. Ex. B at T67).

Letters accompanying Transaero's bills to the Air Force in September and October 1985 warn the Air Force that interest is accumulating (DX 29, DX 30, and DX 31).

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bill.

[10] Although the Air Force notes that the full amount of the payment was not applied by Transaero, they do not argue over the error which represents a difference of about $5100.

Appendix V
(Sept. 18, 1997 EDNY Decision)

In or around November 1985 the Air Force contacted Transaero to discuss settlement of the debt (DX 38). Mr. Dalton made an offer to the Air Force to settle the matter completely for $500,000 (DX 39 and DX 41). Transaero repeated its offer to the Minister of Finance in late December (DX 24). Shortly thereafter, the U.S. Embassy in Bolivia sent a cable to the State Department who forwarded the cable to Transaero. The cable indicates that Mr. Walter West, the Economic Counselor of the State Department, met with the Minister of Finance and discussed the debt owed by the Bolivian government to Transaero (DX 9). The cable notes that the Minister of Finance rejected Transaero's offer and counter-offered to pay $216,000 of the principal and $50,000 as partial compensation of the interest (Id.). Mr. Dalton then sent a cable to the Minister of Finance indicating Transaero's acceptance of the offer (DX 10). Mr. Dalton notified the State Department of Transaero's acceptance and asked the State Department to follow-up on the transfer of funds (DX 11). The Minister of Finance sent Mr. Dalton a telex acknowledging his receipt of Mr. Dalton's acceptance of the offer which "covers principal and interest on the outstanding invoices of material supplied to the Bolivian AF" (DX 12). On January 6, 1986 the Air Force paid Transaero $266,427.47 (DX 10). The evidence illustrates that the payment was expected to be applied first to the total principal amount with the remainder of interest (See e.g. DX 9, 10, and 11).

In April 1986, the Air Force informed Transaero that it was not aware of any agreements between the Ministry of Finance and Transaero (DX 35).

In June 1986, Transaero sent another invoice illustrating that Transaero had applied the January 1986 payment to the existing principal until that amount was extinguished (PX Supp. Ex. B at T62; DX 14; Tr. at 99).[11] The letter accompanying the bill indicates that Transaero recognized that all invoices were finally paid as of January 1986. The letter also notes that the remaining $50,000 was applied to interest but interest remained unpaid (DX 14; Tr. at 100). The bill also shows that Transaero was charging three separate interest charges: (i) interest on the invoices which had yet to be paid; (ii) interest on the interest which had accrued on the invoices yet to be paid; and (iii) interest on the interest accrued on the invoices already paid in October 1984.

The next bill was sent six months later in December 1986 and illustrates that Transaero no longer provided the Air Force with an itemized bill but, rather, continued to charge interest at 1 3/4% on the total sum specified on the June 6, 1986 bill (PX Supp. Ex. B at T60). Transaero thereafter followed this new billing style and attached the June 6th bill to each monthly bill.

In March 1987, the Air Force wrote Transaero asking them to meet with the Minister of Finance in order to solve the problem of "the pending debt regarding high interest due" (PX 20). A month later, the Air Force again wrote to Transaero

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[11] The Second Circuit recognized this in Transaero II when it discussed the issue of jurisdiction. See 24 F.3d at 461 ("Invoices submitted by Transaero to the Bolivian Air Force show that Transaero applied the Air Force's last payment to the outstanding principal debt and that, apparently, from that time on, BAF owed interest only.").

offering to pay an additional amount of interest (DX 15). In that letter, the Air Force objects to the charging of interest on the invoices that were paid. Mr. Dalton wrote back at the end of the month requesting that the Air Force forward a payment (PX 23).

Transaero continued to send bills to the Air Force until August 31, 1987. The air Force never made any further payments and the present suit was not filed until a little over a year later.

In November 1991, the Bolivian Ambassador wrote counsel for Transaero indicating that the Ministry of Finance and the Air Force would form a commission for purposes of negotiating the debt owed (DX 47).

THE AIR FORCE'S POSITION

The Air Force's argues that January 1986 is the proper date for cessation of interest. As discussed, supra, on that date, the Air Force paid Transaero $266,427.47. The Air Force asserts that this payment represents a full settlement as a result of negotiations with Transaero.

In the alternative, the Air Force argues that even if there were not settlement, the Air Force's last payment satisfied the entire principal balance and $50,000 of the interest. Consequently, Transaero is entitled to the contract rate of interest on each invoice only until the date that the principal amount of that invoice was paid.

Additionally, the Air Force then asserts that the agreement between the parties did not call for compound interest. Moreover, even if the contract did call for compound interest, at the time of the agreement such was not allowed under both New York and Bolivian law. The Air Force also urges that the facts do not support liability for compound interest by way of an account stated.

TRANSAERO'S POSITION

Transaero's main argument is that the underlying damage award set forth in the default judgment should not be modified at this stage since it is law of the case.

Transaero also disputes the existence of a settlement between the parties; rather, it argues that the Air Force's last payment in January 1986 was merely a partial payment. It asserts that the Air Force's actions after the payment supports Transaero's position.

Additionally, Transaero argues that pursuant to the terms of the agreement, the Air Force was obligated to pay compound interest and that such obligation did not cease once the Air Force paid an amount equal to the price of the purchased equipment. It asserts that to follow the Air Force's position would render the interest provision meaningless.

Transaero views the Air Force's debt as a combination of principal and interest such that Transaero applied the Air Force's payments to the total amount and the Amount remaining continued to accrue interest. Transaero states in its

post-hearing memorandum that "[i]t is not an acceptable inference that Transaero would have treated application of payment against an account which was accumulating simple interest in the same manner that it treated a payment against an account accumulating compound interest."[12] Transaero admits that several of its post-1986 bills indicate that the Air Force's payment satisfied the original purchase price (Id. at 50). However, it argues that because it was collecting compound interest, it is irrelevant whether Transaero applied the payment to interest or principal.

Additionally, Transaero asserts that New York law applies to the present contract and permits Transaero to charge compound interest.[13]

Transaero further asserts that the Air Force knew that Transaero compounded the interest, failed to object, and, instead, made two payments. Thus, Transaero should be able to recover under the theory of an account stated. Transaero claims that it gave the Air Force sufficient consideration for the payment of compound interest because Transaero was willing to enter into a contract with the Air Force despite the Air Force's tardiness in paying previous debts it owed Transaero and because it needed to recover its own interest expenses which it incurred from financing the Air Force's purchases.

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[12] Plaintiff Transaero, Inc.'s Memorandum Of Points And Authorities Addressing Issues Raised By The Defendant The Bolivian Air Force At The Hearings On Remand at 49-50.

[13] Although Transaero argues that New York law applies, it also argues that under Bolivian law, compound interest is permissible.

Transaero also requests that the Court grant pre-judgment interest which allegedly represents interest and contractual damages from the date the complaint was filed until the date judgment was entered.

CONCLUSIONS OF LAW

For the most part, we disagree with Transaero's position that the Air Force should be prevented from arguing that the amount of the judgment is incorrect. In Transaero I, we held that Transaero's attorney, Jacobs, had a legal and factual basis upon which he could in good faith represent to the Court that the Air Force was indebted to Transaero for the amount claimed in the complaint. However, we also specifically acknowledged that the accuracy of the attorney's argument was not in issue.[14]

Similarly, the Second Circuit affirmation of this Court's finding that Transaero had a good faith basis for believing that the Air Force had acknowledged the payment of compound interest, does not indicate or even imply that compound interest was proper. As noted above, the Second Circuit specifically

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[14] Transaero ignores the following statement:

Whether his affidavit correctly recounts the law and the facts is not the issue. The time has passed when this court will consider the merits of Transaero's claim. The only issue before us is whether the default judgment was obtained by fraud.

Transaero I at 15.

held that whether Transaero is entitled to compound interest under the contract or the applicable law is an open question.[15]

The City of New York v. The State of New York, 408 N.Y.S. 2d 702 (Ct. Cargo Loss. 1978) relied on by Transaero is inapposite. In that case, the parties had fully litigated the amount of interest due plaintiff in a previous case. Thus, the Court of Claims found that defendants were barred under the collateral estoppel doctrine from re-litigating plaintiff's entitlement to such interest. Such is not the case here, the proper amount due Transaero, which is directly related to a determination of the proper date interest ceased to accrue, was never litigated.

Although we find it is appropriate for the Air Force to challenge the amount of the default judgment on the basis that it improperly charged compound interest or that the Transaero did not apply the Air Force's payments correctly, we do not interpret the Second Circuit's remand as permitting this Court to determine whether the Air Force's second payment (and the circumstances surrounding such payment) was a settlement of any claim Transaero had against the Air Force. We therefore agree with Transaero, that the Air Force should not be permitted to argue that there was a settlement.

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[15] To further make its point, Transaero incorrectly relies on this Court's opinion in Transaero I as well as the Second Circuit's decision on appeal in Transaero II which held that the interest amount should be considered as part of the principal for purposes of determining jurisdiction and whether mandatory arbitration should have been required.

With that established we may now discuss the issue of cessation of interest and whether compound interest was permissible in this case.

The general rule is that payment upon a debt consisting of both principal and interest is first applied to interest and then to principal. See Spang Indus., Inc. v. Aetna C. & S. Co., 512 F. 2d 365, 371-2 (2d Cir. 1975); Shepard v. City of New York, 216 N.Y. 251-256, 110 N.E. 435 (1915). However, where the debtor owes multiple obligations to a creditor, the debtor has the right to specify to which obligation any payment made should be applied. MTB Bank v. Federal Armored Exp., Inc., 949 F. Supp. 226, 229 (S.D.N.Y. 1997). If the debtor does not specify any particular allocation, then the creditor may allocate the payment made; however, once the application is communicated to the debtor, it is binding on the creditor. See In Re Stacy, Wolf, Hat Co. Inc., 99 F.2d 793, 794 (2d Cir. 1938) ("[T]hey [the payment entries] would not be conclusive evidence of an irrevocable application unless communicated to the debtor." (citations omitted)); see also Matter of S & W Exporters, Inc., 16 B.R. 941, 945 (Bankr. S.D.N.Y. 1982); Beyer Bros. of Long Island v. Kowalevich, Corp., 89 A.D. 2d 1005, 454 N.Y.S. 2d 444, 445 (2d Dept. 1982). Of course, both parties are free to agree to a particular allocation at the time of the payment or later, or to agree to re-allocate payments made. MTB Bank, 949 F. Supp. at 229.

In the present case, Transaero states that it applied the payments to the combination of principal and interest, but the bills it sent to the Air Force clearly show that it applied both payments to the principal or invoice amount. Since

Transaero's application of the payment, as illustrated by the bills sent out, was communicated to the Air Force, Transaero cannot now alter its application. Moreover, there is no evidence that Transaero and the Air Force agreed to re-allocate the payments.

Nonetheless, Transaero's acceptance of the principal amount did not absolve the Air Force from paying the interest that had already accrued on the invoices prior to payment. Davison v. Klaess, 280 N.Y. 252, 261, 20 N.E. 2d 744 (1939) ("Mere acceptance of partial payments and application thereof to principal with nothing more constituted no waiver of interest." (citation omitted)); William Iselin & Co., Inc. v. Rosenzweig & Pincus, Inc., 10 N.Y.S. 2d 900, 901 (1st Dept. 1939). Transaero made clear its intention to collect interest in the letters it attached to its bills as well as in the bills themselves. See Shepard, 216 N.Y. 256-57. Thus, Transaero is entitled to that interest which has accrued on the outstanding invoices at the contract rate (1 3/4%) up until the time the invoices were paid.

Two questions emerge: First, what type of interest is Transaero entitled to on the outstanding invoices--simple or compound? Second, once the Air Force paid the principal amount of the debt, was Transaero entitled to continue charging interest on the interest that was already due?

First we note that the plain language of the agreement states that interest will be due at a certain rate "on all outstanding invoices" (DX 1). Thus, the agreement does not specifically state that compound interest was to be charged. Moreover, in

its bills, Transaero used the term "invoice" to refer to both the actual bill, as well as the particular purchase. The phrase on "all outstanding invoices" is, therefore, at best ambiguous.

Prior to 1989, a promise to pay interest upon interest was void if made at a time before simple interest had accrued. Giventer v. Arnow, 37 N.Y. 2d 305, 308, 372 N.Y.S. 2d 63,66 (1975); Newburger-Morris Co. v. Talcott, 219 N.Y. 505, 510, 114 N.E. 846 (1916); Young v. Hill, 67 N.Y. 162, 167-68 (1876).[16]

Although compounding of interest is valid, only the compounding clause of the contract is invalidated, and the contract remains in force. See Giventer, 37 N.Y. 2d at 309; In re Rosner v. ESIC Capital Corp., 48 B.R. 538, 558 (Bankr. E.D.N.Y. 1985). The lender may recover principal plus simple interest on that principal. Rosner, 48 B.R. at 558; See also In the Matter of Carla Leather, Inc., 44 B.R. 457, 466 (Bankr. S.D.N.Y. 1984), aff'd, 50 B.R. 764 (S.D.N.Y. 1985). Furthermore, when such interest has been voluntarily paid, it

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[16] In 1989, New York adopted General Obligations Law § 5-527 which permits an agreement containing compound interest if the principal debt is more than $250,000 and if the loan is not secured by a one or two family owner-occupied residence. Compound interest is defined as the accruing interest upon unpaid interest irrespective of whether such unpaid interest is added to the principal debt. Thus, the statute does not distinguish between what is traditionally known as compound interest and "interest on interest". The 1989 law is also not retroactive. Pravin Banker Assoc. v. Banco Popular Del Peru, 912 F. Supp. 77, 83 (S.D.N.Y. 1996); In Re Chateaugay Corp. v. LTV Steel, Co, Inc. 170 B.R. 551, 556 (Bankr. S.D.N.Y. 1994).

may be retained. Young, 67 N.Y. at 167; Rosner, 48 B.R. at 558.

Since the present agreement was made in 1981 and well before any interest had accrued, Transaero improperly charged the Air Force compound interest on the invoice amounts due for the Air Force's purchases. Likewise, Transaero improperly charged interest on the outstanding interest which accrued on the paid invoice amounts.

Defendant relies on Household Finance Corp. v. Goldring, 263 A.D. 524, 33 N.Y.S.2d 514 (2d Dept.), aff'd, 289 N.Y. 574 (1942) and In The Matter of the Estate of Jackson, 120 A.D. 2d 309, 508 N.Y.S. 2d 671 (3d Dept. 1986), appeal denied, 69 N.Y. 2d 608, 514 N.Y.S. 2d 1026 (1987) in support of its position. Household simply stands for the general proposition that contracts to pay interest when interest has already become due are permissible. If, as Transaero contends, the agreement in this case calls for compound interest, then it was necessarily an agreement made before interest had fallen due -- this is improper. In Jackson the creditor had waived the right to collect the interest until principal amount was due. Thus the charging of interest on interest at the end of the agreement was a way to merely increase the rate of interest. Here, Transaero never waived its right to collect interest.

Additionally, Transaero cannot recover under the theory that a statement of account requires the payment of compound interest. First, the Court of Appeals of New York stated generally in Young v. Hill, 67 N.Y. 165, 173 (1876) that the

law will not imply a promise to pay compound interest. The court explained:

> The law, while it permits the party to become bound to pay interest will not imply or impose an obligation to pay in the absence of a promise and without any consideration for a promise. The statement of the account does not give the plaintiffs an action for the recovery of compound interest. The statement of account is not the equivalent of an express promise to pay the balance when the items do not constitute a legal debt or duty.

See also Rourke v. Thomas Assoc., 216 A.D. 2d 717, 627 N.Y.S. 2d 831 (3d Dept.), appeal dismissed, 86 N.Y. 2d 837, 634 N.Y.S. 2d 445 (1995) (affirming Supreme Court's refusal to submit to the jury the issue of whether there was an implied agreement to charge compound interest based on an account stated and holding that "as a matter of law, there can be no implied agreement to charge compound interest."); Slayback v. Alexander, 179 A.D. 696, 167 N.Y.S. 194, 196 (1st Dept. 1917) ("[T]he addition of the interest monthly did not constitute the statement then rendered a new account; for in so far as it involved compound interest...it was unauthorized."); Reusens v. Arkenburgh, 135 A.D. 75, 119 N.Y.S. 821, 824 (1st Dept. 1909).

In case of merchants, there is authority for permitting compound interest from acknowledgment of a statement account, where it is shown that it was the custom and usage

between the parties and that there was consideration or forbearance to make the promise good. Young, 67 N.Y. 171-2; Newburger-Morris v. Talcott, 219 N.Y. 505, 510-512, 114 N.E. 836 (1916). Such consideration might be money advanced or another right relinquished by the creditor, or, a benefit conferred upon the debtor. Young, 67 N.Y. at 171.

Transaero has not shown that it was the custom and usage between the parties to charge compound interest. Transaero has also not shown that it rendered sufficient consideration for the charging of compound interest. For example, Transaero never have up the right at any point to bring suit against the Air Force for the full amount that it alleged was due. See Young, 67 N.Y. at 171 ("Delay in payment was neither asked or granted, and if this action can be maintained, a like action might have been brought immediately."). Although Transaero states that it was forced to pay its lenders interest because the Air Force was late with its payments, there is no evidence to support this statement other than Transaero's own statements in its letters to the Air Force.[17] Transaero also argues that it rendered consideration since it increased the credit limit specified in the original contract. However, the increase in the credit limit occurred before the Air Force received the first bill, and thus before Transaero ever began charging the Air Force compound interest.

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[17] In Telemark Construction, Inc. v. Greenburg, 205 A.D. 2d 438, 613 N.Y.S. 2d 900 (1st Dept. 1994), cited by Transaero, the record contained evidence that plaintiff needed to borrow to meet its expenses. Moreover, the plaintiff failed to argue the propriety of charging compound interest at trial and therefore did not preserve the issue on appeal. Id. at 902.

Lastly, we decline to follow the Third Circuit's interpretation of Second Circuit law in In the Matter of Magnus Harmonica Corp., 262 F. 2d 515 (3d Cir. 1959), since in that case the contract specifically required that the monthly statements would be deemed correct and constitute an account stated unless the creditor received written notice by a certain date to the contrary. These circumstances are not present in the instant case.[18]

We further note that the Air Force objected to the payment of compound interest before the Air Force filed suit. With respect to Transaero's other arguments, we have considered them but hold that the contract in question calls for simple interest.

Since interest on interest was not allowable at the time pre-judgment interest would have begun to accrue, we find that Transaero is not entitled to pre-judgment interest on the simple interest that accrued.

ORDER

The judgment entered April 28, 1989 is vacated and the Court directs the clerk to enter an amended judgment nunc pro tunc in favor of Transaero Inc. and against the defendant, La Fuerza Aerea Boliviana in the amount of $336,232.06, together with interest from April 28, 1989.

SO ORDERED,

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[18] In light of our decision we need not decide whether compound interest was permissible under Bolivian law.

Appendix V
(Sept. 18, 1997 EDNY Decision)

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JACOB MISHLER, U.S.D.J.

Appendix W

Appendix W
(EDNY 1997 Amended Judgment)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
_____X

TRANSAERO, INC.,
Plaintiff, CV-88-2788

-against

LA FUERZA AEREA BOLIVIANA, an Instrumentality of THE REPUBLIC OF BOLIVIA, a Foreign State,
Defendant.

_____X

Amended Judgment
September 18, 1997

MISHLER, District Judge:

The issue of damages having come on for trial before this Court, Honorable Jacob Mishler, District Judge, presiding, and a decision having been duly rendered, it is

Ordered

that the default judgment entered on April 28, 1989 be and the same is hereby vacated, and

It is Ordered and Adjudged

That the plaintiff Transaero, Inc. recover of the defendant La Fuerza Aerea Boliviana the sum of $336,2323.06, together with interest from April 28, 1989 and its costs of action

Appendix W
(EDNY 1997 Amended Judgment)

Dated at Uniondale, New York this 18th day of September, 1997.

_____
Clerk of the Court
Approved as to Form

By: Joseph DiTalia
Deputy Clerk-in-Charge

_____
Jacob Mishler, U.S.D.J.

Appendix X

Appendix X

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

TRANSAERO, INC.,

Plaintiff,

-against-

LA FUERZA AEREA BOLIVIANA, an Instrumentality of THE REPUBLIC OF BOLIVIA, a Foreign State,
Defendant.

CV-88-2788

Memorandum of Decision and Order

October 17, 1997

APPEARANCES:

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Appendix X

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MISHLER, District Judge:

We have considered plaintiff's Motion for Reconsideration of the Court's Decision Modifying Judgment as well as defendant's opposition to said motion. The Court adheres to its September 18, 1997 Memorandum of Decision & Order ("Decision") and accompanying Amended Judgment. We note, however, that page 14, lines 11-13 of the Decision should read: "Transaero wrote back at the end of the month requesting that the Air Force forward a payment (PX 23)."

SO ORDERED,

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JACOB MISHLER, U.S.D.J.

Appendix Y

Appendix Y
(Statutory Material: Excerpts FSIA)

STATUTORY MATERIAL

Excerpts from the Foreign Sovereign Immunities Act of 1976, Title 28, United States Code.

§1330. Actions against foreign states

(a) The district courts shall have original jurisdiction without regard to amount in controversy of any nonjury civil action against a foreign state as defined in section 1603(a) of this title as to any claim for relief in personam with respect to which the foreign state is not entitled to immunity either under sections 1605-1607 of this title or under any applicable international agreement.

(b) Personal jurisdiction over a foreign state shall exist as to every claim for relief over which the district courts have jurisdiction under subsection (a) where service has been made under section 1608 of this title.

(c) For purposes of subsection (b), an appearance by a foreign state does not confer personal jurisdiction with respect to any claim for relief not arising out of any transaction or occurrence enumerated in sections 1605-1607 of this title.

§ 1391. Venue generally

(f) A civil action against a foreign state as defined in tion 1603(a) of this title may be brought -

(1) in any judicial district in which a substantial part of the event or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated.

(2) in any judicial district in which the vessel or cargo of a foreign state is situated, if the claim is asserted under section 1605(b) of this title;

(3) in any judicial district in which the agency or instrumentality is licensed to do business or is doing business, if the action is brought against an agency or instrumentality of a foreign state as defined in section 1603(b) of this title; or

(4) in the United States District Court for the District of Columbia if the action is brought against a foreign state or political subdivision thereof.

§ 1603. Definitions

For purposes of this chapter--

Appendix Y
(Statutory Material: Excerpts FSIA)

(a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).

(b) An "agency or instrumentality of a foreign state" means any entity--

(1) which is a separate legal person, corporate or otherwise, and

(2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and

(3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country.

(c) The "United States" includes all territory and waters, continental or insular, subject to the jurisdiction of the United States.

(d) A "commercial activity" means either a regular course of commercial conduct or a particular commercial transaction or act. The commercial character of an activity shall be determined by reference to the nature

of the course of conduct or particular transaction or act rather than by reference to its purpose.

(e) A "commercial activity carried on in the United States by a foreign state" means commercial activity carried on by such state and having substantial contact with the United States.

§ 1608. Service; time to answer; default

(a) Service in the courts of the United States and of the States shall be made upon a foreign state or political subdivision of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special arrangement for service between the plaintiff and the foreign state or political subdivision; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraphs (1) or (2), by sending a copy of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched

by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned, or

(4) if service cannot be made within 30 days under paragraph (3), by sending two copies of the summons and complaint and a notice of suit, together with a translation of each into the official language of the foreign state, by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the Secretary of State in Washington, District of Columbia, to the attention of the Director of Special Consular Services -- and the Secretary shall transmit one copy of the papers through diplomatic channels to the foreign state and shall send to the clerk of the court a certified copy of the diplomatic note indicating when the papers were transmitted.

As used in this subsection, a "notice of suit" shall mean a notice addressed to a foreign state and in a form prescribed by the Secretary of State by regulation.

(b) Service in the courts of the United States and of the States shall be made upon an agency or instrumentality of a foreign state:

(1) by delivery of a copy of the summons and complaint in accordance with any special

arrangement for service between the plaintiff and the agency or instrumentality; or

(2) if no special arrangement exists, by delivery of a copy of the summons and complaint either to an officer, managing or general agent, or to any other agent authorized by appointment or by law to receive service of process in the United States; or in accordance with an applicable international convention on service of judicial documents; or

(3) if service cannot be made under paragraph (1) or (2), and if reasonably calculated to give actual notice, by delivery of a copy of the summons and complaint, together with a translation of each into the official language of the foreign state --

(A) as directed by an authority of the foreign state or political subdivision in response to a letter rogatory or request or

(B) by any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the agency or instrumentality to be served, or

(C) as directed by order of the court consistent with the law of the place where service is to be made.

(c) Service shall be deemed to have been made--

(1) in the case of service under subsection (a)(4), as of the date of transmittal indicated in the certified copy of the diplomatic note; and

(2) in any other case under this section, as of the date of receipt indicated in the certification, signed and returned postal receipt, or other proof of service applicable to the method of service employed.

(d) In any action brought in a court of the United States or of a State, a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state shall serve an answer or other responsive pleading to the complaint within sixty days after service has been made under this section.

(e) No judgment by default shall be entered by a court of the United States or of a State against a foreign state, a political subdivision thereof, or an agency or instrumentality of a foreign state, unless the claimant establishes his claim or right to relief by evidence satisfactory to the court. A copy of any such default judgment shall be sent to the foreign state or political

subdivision in the manner prescribed for service in this section.

§ 1610. Exceptions to the immunity from attachment or execution

(a) The property in the United States of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if--

(1) the foreign state has waived its immunity from attachment in aid of execution or from execution either explicitly or by implication, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, or

(2) the property is or was used for the commercial activity upon which the claim is based, or

(3) the execution relates to a judgment establishing rights in property which has been taken in violation of international law or which has been exchanged for property taken in violation of international law, or

(4) the execution relates to a judgment establishing rights in property--

(A) which is acquired by succession or gift, or

(B) which is immovable and situated in the United States: *Provided*, That such property is not used for purposes of maintaining a diplomatic or consular mission or the residence of the Chief of such mission, or

(5) the property consists of any contractual obligation or any proceeds from such a contractual obligation to indemnify or hold harmless the foreign state or its employees under a policy of automobile or other liability or casualty insurance covering the claim which merged into the judgment, or

(6) the judgment is based on an order confirming an arbitral award rendered against the foreign state, provided that attachment in aid of execution, or execution, would not be inconsistent with any provision in the arbitral agreement.

(b) In addition to subsection (a), any property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States

shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State after the effective date of this Act, if--

(1) the agency or instrumentality has waived its immunity from attachment in aid of execution or from execution either explicitly or implicitly, notwithstanding any withdrawal of the waiver the agency or instrumentality may purport to effect except in accordance with the terms of the waiver, or

(2) the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of section 1605(a)(2),(3), or (5), or 1605(b) of this chapter, regardless of whether the property is or was used for the activity upon which the claim is based.

(c) No attachment or execution referred to in subsections (a) and (b) of this section shall be permitted until the court has ordered such attachment and execution after having determined that a reasonable period of time has elapsed following the entry of judgment and the giving of any notice required under section 1608(e) of this chapter.

(d) The property of a foreign state, as defined in section 1603(a) of this chapter, used for a commercial activity in the United States, shall not be immune from

attachment prior to the entry of judgment in any action brought in a court of the United States or of a State, or prior to the elapse of the period of time provided in subsection (c) of this section, if--

(1) the foreign state has explicitly waived its immunity from attachment prior to judgment, notwithstanding any withdrawal of the waiver the foreign state may purport to effect except in accordance with the terms of the waiver, and

(2) the purpose of the attachment is to secure satisfaction of a judgment that has been or may ultimately be entered against the foreign state, and not to obtain jurisdiction.

(e) The vessels of a foreign state shall not be immune from arrest in rem, interlocutory sale, and execution in actions brought to foreclose a preferred mortgage as provided in section 1605(d).

§ 1611. Certain types of property immune from execution

(b) Notwithstanding the provisions of section 1610 of this chapter, the property of a foreign state shall be immune from attachment and from execution, if--

(1) the property is that of a foreign central bank or monetary authority held for its own account, unless such bank or authority, or its parent

foreign government, has explicitly waived its immunity from attachment in aid of execution, or from execution, notwithstanding any withdrawal of the waiver which the bank, authority or government may purport to effect except in accordance with the terms of the waiver; or

(2) the property is, or is intended to be, used in connection with a military activity and

(A) is of a military character, or

(B) is under the control of a military authority or defense agency.

Appendix Z

(Statutory Material:
Excerpts Federal Rules of Civil Procedure)

FEDERAL RULES OF CIVIL PROCEDURE, EXCERPTS, RULES 12(b), 12(g), 12 (h).

Rule 12. Defenses and Objections - When and How Presented - By Pleading or Motion - Motion for Judgment on the Pleadings

(b) How Presented. Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, cross-claim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion:

(1) lack of jurisdiction over the subject matter,
(2) lack of jurisdiction over the person,
(3) improper venue,
(4) insufficiency of process,
(5) insufficiency of service of process,
(6) failure to state a claim upon which relief can be granted,
(7) failure to join a party under Rule 19.

A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more other defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, the adverse party may assert at the trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon

which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

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(g) Consolidation of Defenses in Motion. A party who makes a motion under this rule may join with it any other motions herein provided for and then available to the party. If a party makes a motion under this rule but omits therefrom any defense or objection then available to the party which this rule permits to be raised by motion, the party shall not thereafter make a motion based on the defense or objection so omitted, except a motion as provided in subdivision (h)(2) hereof on any of the grounds there stated.

(h) Waiver or Preservation of Certain Defenses.

(1) A defense of lack of jurisdiction over the person, improper venue, insufficiency of process, or insufficiency of service of process is waived

(A) if omitted from a motion in the circumstances described in subdivision (g), or

(B) if it is neither made by motion under this rule nor included in a responsive pleading or an amendment thereof permitted by Rule 15(a) to be made as a matter of course.

(2) A defense of failure to state a claim upon which relief can be granted, a defense of failure to join a party indispensable under Rule 19, and an objection of failure to state a legal defense to a claim may be made in any pleading permitted or ordered under Rule 7(a), or by motion for judgment on the pleadings, or at the trial on the merits.

(3) Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Jan. 21, 1963, eff. July 1, 1963; Feb. 28, 1966, eff. July 1, 1966; Mar. 2, 1987, eff. Aug. 1, 1987; Apr. 22, 1993, eff. Dec. 1, 1993.)

(Statutory Material:
Excerpts Federal Rules of Civil Procedure)

FEDERAL RULES OF CIVIL PROCEDURE

RULE 60. RELIEF FROM JUDGMENT OR ORDER

(b) *Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc.*

On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or

(6) any other reason justifying relief from the operation of the judgment.

The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., Sec. 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

(As amended Dec. 27, 1946, eff. Mar. 19, 1948; Dec. 29, 1948, eff. Oct. 20, 1949; Mar. 2, 1987, eff. Aug. 1, 1987.)